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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

KURT EMIL BRUNO MOLZAHN,
Petitioner,

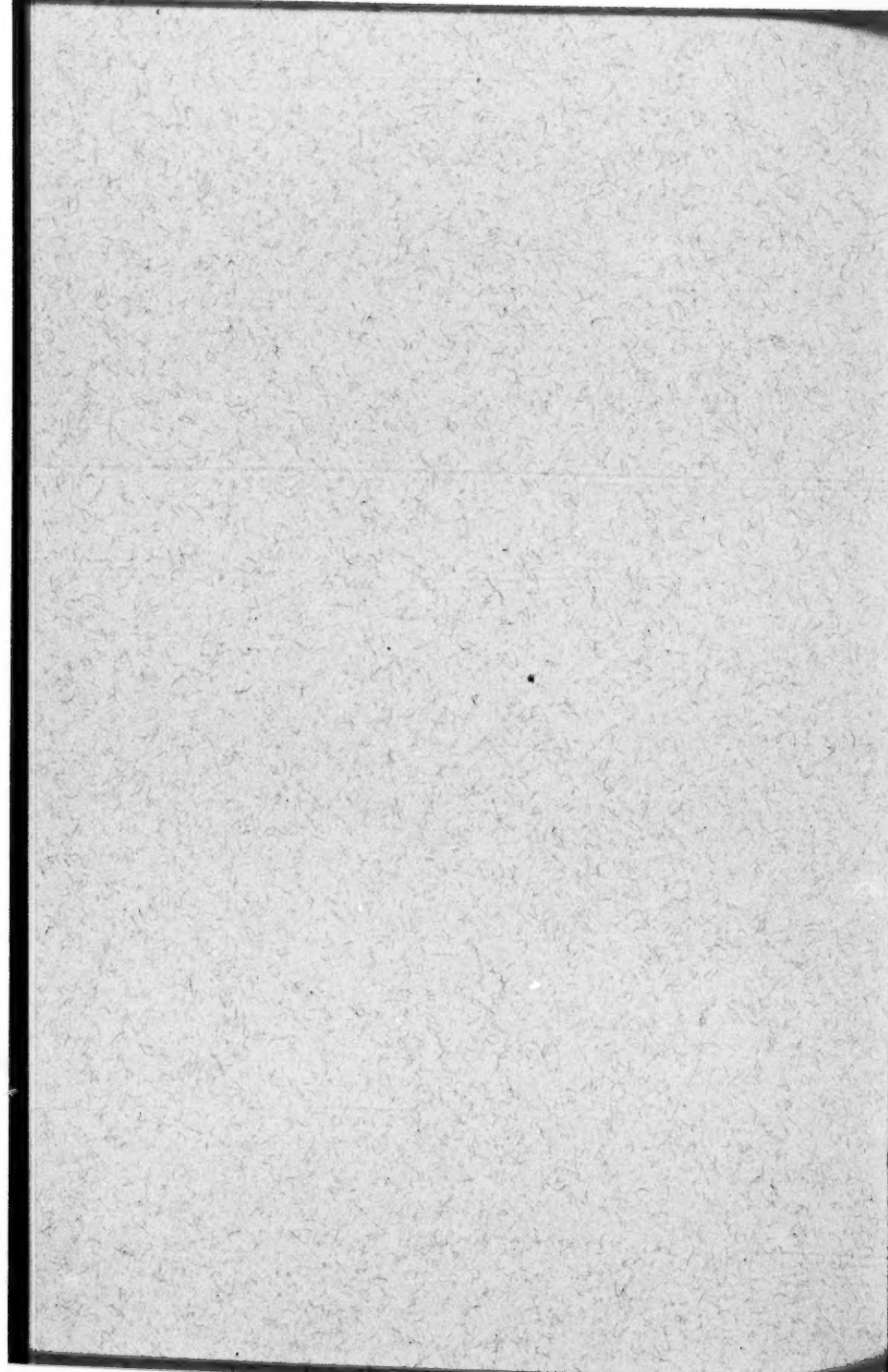
against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT
AND BRIEF IN SUPPORT THEREOF.

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Summary and Statement of the Matter Involved.

The petitioner was indicted with four other defendants, Anastase A. Vonsiatsky, Gerhard Wilhelm Kunze, Wolfgang Ebell and Otto Willumeit, in the District Court for the District of Connecticut on June 10, 1942. The indictment, which was drawn under Section 34 and subsection (a) of Section 32 of Title 50 of the United States Code, charged the defendants with conspiring between the dates of January 1, 1941, and December 7, 1941, to transmit information relative to our national defense to the governments of Germany and Japan, with intent that the information would be used to the injury of the United States and the advantage of the two other nations. The five defendants would obtain and collect such information, the defendant Kunze would be provided by the defendant Vonsiatsky with funds for collecting the information, and taking it to Mexico and from that country transmitting it to the two countries named. The other defendants would assist Kunze in going to Mexico, and after his arrival there they were to send him additional information relating to the national defense.

Previously to the finding of the indictment, a subpoena notice had been served on your petitioner to appear in Hartford, Connecticut, May 26, 1942, before the Grand Jury in a case captioned U. S. v. Grand Jury. When he reached Hartford he was asked by representatives of the Federal Bureau of Investigation whether he had any objection to being examined before the Grand Jury. He answered that he had not, and he waived any right that he might have had to object to such questioning. He went before the Grand Jury and answered the questions asked him to the best of his ability. He left Hartford on the same day and reached his home in Philadelphia late that night. On the following day, about one o'clock in the afternoon, two representatives of the F.B.I. came to his house and asked leave to examine his books, papers and other articles. He said he had no objection to their

doing so, and he waived any rights that he might have had to object to the search being made. The men accordingly searched his house from top to bottom and selected certain books, papers and other articles which they took away with them to be used later by the Government as the representatives might see fit. At this time your petitioner was not represented by counsel.

On June 11th, the day after the indictment had been found, your petitioner was arrested in Philadelphia and committed to the County Prison, the bail being set at \$25,000 and he being unable to secure the needed surety. Later, on June 15th, \$25,000 in cash having been raised by his friends and deposited with the United States Commissioner in lieu of bail, your petitioner was released, he giving his personal recognizance to appear when required to do so in the District Court for the District of Connecticut. He had on that day secured counsel to represent him.

On June 22nd your petitioner was arraigned and pleaded not guilty to the indictment. Certain of the defendants pleaded not guilty and afterwards withdrew their pleas and filed pleas of guilty. On July 29th, when your petitioner was placed on trial, they all had pleaded guilty. Your petitioner's case came on for trial on July 29th before Hon. J. Joseph Smith, District Judge, the trial lasting nearly four weeks.

The Government produced evidence showing that three of the four defendants had participated in a conference on July 26, 1941, at the Hotel Bismarck in Chicago. Plans were then and there discussed which constituted the gist of the conspiracy. The Government also showed acts done in furtherance of the plans by all four conspirators but it did not show by direct evidence that your petitioner was party to the plans or did anything to further them. The evidence against him, so far as participation in the conspiracy is concerned, is that found in the testimony of the witness Alexsy Pelypenko, who described himself as an Ukranian, as having been originally a priest of the

Russian or Greek Orthodox Church and as subsequently becoming a priest of the Roman Catholic Church in 1925. He was referred to throughout the trial as the priest or Father Pelypenko. The testimony of this witness consisted of his version of a conversation that he had with your petitioner and the case rests on the sufficiency of that conversation to show your petitioner's knowledge of and participation in the conspiracy. Upon that conversation as a base there was built up a mass of oral testimony to show "intent." In addition the pamphlets, pictures, photographs and other articles found by the representatives of the F.B.I. in the petitioner's home were introduced. Petitioner's counsel contended that neither participation in, nor knowledge of the conspiracy had been shown, and at the close of the Government's case moved for a directed verdict of not guilty. The motion was declined by the Court and an exception allowed. Evidence was then offered for your petitioner, a number of witnesses being examined in his behalf and he himself denying from the stand the version of the conversation as given by Father Pelypenko. There was nothing in the evidence for the defense that strengthened the Government's case, and after the evidence submitted by the defendant and a short amount of evidence in rebuttal had been placed before the jury, petitioner's counsel moved again for a directed verdict of acquittal. The motion was denied and an exception allowed.

The case went to the jury on arguments of counsel and a charge from the court, and the jury brought in a verdict of guilty. This was on August 23rd. Motions were thereupon made by petitioner for enlargement on bail and to set aside the verdict and grant a new trial. The court refused the motion to enlarge on bail, and set August 25th for hearing argument on the motion to set aside and grant a new trial. Argument was had on the day mentioned, and the Judge at the conclusion of the argument refused the motion, stating orally his reason for the refusal. An exception to the Court's action was asked and allowed.

The Court thereupon sentenced your petitioner to ten years' imprisonment. He was committed temporarily to the Federal Correctional Institution at Danbury and later transferred to the Federal Prison at Lewisburg, Pa., where he is at present.

All the other defendants, as has been said, had pleaded guilty before the petitioner was put on trial. Vonsiatsky had been sentenced and given 5 years' imprisonment. Willumeit, Kunze and Ebell were in custody during the trial, and after it was over they were sentenced by the Court, Willumeit receiving a sentence of 5 years' imprisonment, Ebell a sentence of 10 years and Kunze a sentence of 15 years.

The petitioner later appealed to the Court of Appeals for the Second Circuit, asking that the judgment be reversed. Printed briefs were filed by his counsel and by counsel for the Government, and the case was orally argued on February 11, 1943, before Hon. Thomas W. Swan, Hon. Augustus N. Hand, and Hon. Charles E. Clark. A decision was rendered on April 2, 1943, affirming the judgment of the court below, an opinion being filed in behalf of the Court by Hon. Augustus N. Hand, which in addition to being found in the printed Record is printed in the Appendix to this Petition and Brief. A petition for rehearing was filed by your petitioner and the petition was denied by the Court on April 22, 1943.

The petitioner craves the indulgence of the Court that he be allowed to add to what has been already said the following, less formal statement.

Your petitioner is not conscious of having done anything or of having joined with anyone in the doing of anything that violated his oath of allegiance to the United States or violated the laws of his country. He avers that a great injustice has been done him and that through him an injustice has been done the congregation of the Lutheran Church of which he was and still is the pastor and to the great church of which he is a clerical member.

There was evidence, it is true, of an agreement to

transmit information to Germany and Japan entered into by Vonsiatsky, Willumeit and of acts of participation by Ebell, but your petitioner was not a party to the agreement nor was he shown to have done anything. He did not know, nor had he ever heard of Vonsiatsky, Willumeit or Ebell until he was indicted with them. He had met Kunze, but his acquaintance with him was slight and he had not seen him for many years prior to the date of the trial and the time of the conspiracy.

As your petitioner views the case in the light of the opinion of the Circuit Court of Appeals the evidence that was considered significant in determining his guilt was that relating to your petitioner's "intent" in doing what he did and the conversation with Father Pelypenko referred to above, to show what he did.

In reviewing this evidence Judge Hand, in his opinion, first analyzed that relating to "intent." He listed as important a shipboard conversation between your petitioner and a Dr. Flatter occurring in the early summer of 1937; your petitioner's acquaintanceship with a man named Kessemeyer, said to be a pronounced Nazi; a conversation between your petitioner and Bishop Pfatteicher in the year 1939 (he was naturalized in 1940), wherein your petitioner weighed the question of his supreme loyalty; a statement made by someone that he seemed to have been known among Bund members as friendly to them; a number of documents, photographs and a Nazi pennant found in your petitioner's home; an address delivered in 1934; and a service in his church in 1937 in memory of Germans who lost their lives in the last war, at which representatives of the Bund were said to have been present in uniform and to have participated.

All of the matters listed were fully answered, but aside from his answer, your petitioner is troubled to find that these items are given weight as showing his "intent" in participating in a conspiracy in which he had no part.

Moreover he cannot understand how a shipboard conversation in 1937, relating, as told by Dr. Flatter, to your

petitioner's German family and political connections and interests could bear upon the issue of the case, nor why it should be significant that another man among your petitioner's thousands of acquaintances was said to be a pronounced Nazi.

Again it seems unfair to hold against your petitioner testimony that he weighed the question of his supreme loyalty in his own mind before applying for his final papers. It may well be true that he searched his own conscience before doing so. Only those who have been called upon to make a similar decision can appreciate the sober spirit in which it is reached. He was not an outcast from his native land. He came of a family of upright law-abiding people who were slow to give their word but once given abided by it. He had chosen America for his life's work but he was interested in and perhaps flattered by offers made to him of posts of importance in Germany. He declined them. He had work to do here and a wide field of opportunity. He was Pastor of Old Zion Lutheran Church, one of the famous churches of America. Its history is part of the history of the Province and Commonwealth of Pennsylvania and of the Nation itself. He was preparing for the celebration of its 200th anniversary when his present trouble came upon him. It is a beautiful church located in the old part of the city and has been preserved, as have other old churches in the same section, by a congregation long since removed from its neighborhood but who maintain it as a venerated emblem of their faith. The members of his congregation consist of those whose families have resided in the city for more than two centuries as well as those who have only recently come to this country.

It must be clear, not only that your petitioner was bound by his oath as an honorable man to his allegiance to the United States after he had taken it, but he was bound by his obligation to his congregation, so largely of old American ancestry. As their pastor he owed them

a return for the faith they showed in him when they asked him to take the pastorate of their church in 1929 and when they loyally supported him in his plans for the church. He is touched by the faith they have continued to show in him.

Surely the statement that he deliberated before taking his oath of allegiance should not be considered as evidence that, once having taken it, he lightly repudiated it, repudiated his vows to his church and broke faith with the congregation that trusted him.

Also your petitioner believes that the display of photographs of Hitler and Goebbels, of a Nazi pennant and various documents found in his home, as evidence against him, was particularly unfair. He had a substantial library for a man of his rather modest means, books in Hebrew, French, German and English. He was alive to, and interested in the fast moving events of the world. He subscribed to magazines and newspapers and was on a number of mailing lists, naturally on those of organizations dedicated to Germany. He received quantities of literature through the mail, much was read, some discarded and some awaited reading. The accumulation was placed in a closet where it was added to from year to year for 13 years. There were thousand of books and individual pieces of literature, and of all this profusion some 12 pieces taken from the closet were brought into court. They were offered and accepted as evidence of your petitioner's "intent." Can any man of wide social and literary interests be condemned, by picking a few items from a great miscellany found in his collection? And yet in this case the items were placed on display before the jury at the time of the trial as an ocular demonstration that a Nazi spy was being tried, and they seem to have been considered by the Circuit Court of Appeals in the same light.

Your petitioner believes he is justified in saying that he was not tried and convicted for anything he did but for

what it was thought he was and that the Circuit Court of Appeals itself treated the evidence of "intent" as if it carried a presumption that he had broken his oath of allegiance to the United States and had committed the crime charged against him.

The Circuit Court of Appeals after reviewing the foregoing evidence of "intent" takes up the testimony of Father Pelypenko; his coming to the United States in March 1941; his meeting with Willumeit in Chicago in April; and his visit to Philadelphia in May, 1941. The testimony of the priest as to this visit was to the effect that he called on the German Consul and secured from him the name of your petitioner with the comment that he was "one of our most important co-workers—one of the closest co-workers of the German Consulate." Your petitioner knows nothing of the statements made by the Consulate, but it does appear that on the slip of paper, which the priest brought into court and showed as having been given him at the Consulate, appears not only your petitioner's name but the name of "Herman H. Koenes, 4400 N. 5th Street" (p. 8). This latter name is that of a friend of your petitioner, a Roman Catholic priest, with whom your petitioner frequently has gone on fishing trips. Father Koenes is not disloyal and yet he was required, as your petitioner was, in the fulfillment of his duties to those who called upon him for aid and advice to consult frequently with the German Consul. Whether Pelypenko visited and reported upon conversations he had with Father Koenes is something your petitioner does not know.

The further testimony of the priest relative to his interview with your petitioner in May in no way relates to the conspiracy charged in the indictment, nor does it purport to do so. As evidence it is directed to the question of "intent."

Your petitioner is certain that the version of the conversation as given by the priest is not correct, and he so testified. In fact he can recall but one interview with the

priest. He still believes that his recollection is correct. To the foregoing there is added the further testimony of the priest that he called at the German Embassy in Washington and discussed your petitioner with Von Haydn, the Secretary of the Embassy. Certainly your petitioner knew nothing of this and could not have done anything about it if he had.

The court then proceeds to abstract the further testimony relating to the priest's meeting with Kunze: his attendance at the Hotel Bismarck conference in Chicago on July 26, 1941, which was also attended by Vonsiatsky, Willumeit and Kunze, where plans were discussed and the question of securing a passport for Kunze was considered. It was suggested that Kunze should get some document, "Polish or Czech or some other that would enable him to pass through 'as an ally'." The priest was given \$50.00 by Kunze upon the promise that he could and would aid him in getting such a document.

It would appear that at this meeting the name of your petitioner was discussed. Whether his name was introduced by the priest or by Kunze depends upon whether the priest's version of the conversation or that of Kunze is believed. In any event your petitioner was entirely innocent of having any part in starting the discussion, the result of which was that Kunze said he would write a letter to your petitioner which according to his own testimony he did under date of July 31, 1941. On that same day he sent a letter to the priest——

"at the Hotel Bristol in New York, which bore on the back flap the words, 'K. c/o Rev. Molzahn, Zion Luth. Church, Franklin Square, Philadelphia, Pa. The envelope contained two small passport photographs of Kunze and was followed by a similar letter post-marked August 2, 1941, directed to Pelypenko at the Hotel Bristol, containing three larger photographs and having a like forwarding address to Molzahn on the back flap. These letters were received by Pely-

penko at New York, who had arrived there from Chicago. There was proof indicating that Kunze in the meantime had written Molzahn about the plan for obtaining passports (Rec. P. 23). Although Kunze claimed that his letter was merely one of introduction and Molzahn denied that he ever received such a communication."

Your petitioner has recited the foregoing extract from the Court's opinion because from his point of view the evidence of what occurred at Chicago should not be accepted as evidence against him since he was not present and never knew anything of the meeting until it was testified to at the time of the trial. Kunze is the only one who knows what was in the letter that he says he wrote to your petitioner. He has testified that there was no reference in it to any of his plans or any arrangements made by him and the priest incident to securing a passport. It would seem that there was no necessity to inform your petitioner of those plans for it was not suggested that he was to get the passport. That was the priest's undertaking.

Your petitioner, as he testified, has no recollection of receiving the letter. He was on his vacation at the time, his home was closed. He had no office staff. That may account for it.

Your petitioner notes that the court then proceeds with its consideration of the testimony as follows:

"After receiving the first of the two letters containing the photographs Pelypenko called to see Molzahn at his office in Philadelphia but found him on vacation and left with his assistant the two small photographs of Kunze which were mailed with the first letter to the Hotel Bristol. On receiving the second letter he again called on Molzahn found him still absent and left at the office two of the three larger photographs contained in the second letter, retaining the third him-

self. He returned about six weeks later and found Molzahn'' * * *

It is to be noted that the priest did not say that he left the photographs with your petitioner's assistant. He says that he left them with "a certain person whose name I do not know. He was sitting there and writing" (Rec., p. 16). There is moreover no evidence that your petitioner received the photographs and definitely there is no evidence that any instructions as to their use were submitted with them. This would seem strange since the agreement made by Pelypenko was that he, himself, would get the passports. It is true as will hereafter be pointed out that the priest did visit the church on August 4. The man who was there at the time was not your petitioner's assistant, he was chairman of the Church Council or Vestry. He did not deliver any photographs to your petitioner. He received none from the priest.

Your petitioner believes that none of the foregoing evidence relating to the conspiracy is brought home to him. All of the matters testified to could have happened, in fact did happen, without his knowing anything about them whatever. It will be noted that at the conclusion of the foregoing citation from the Court's Opinion the case is brought right up to the one significant bit of testimony, namely, the conversation that took place at the time that the priest found your petitioner in his office.

The testimony in addition to that conversation discussed by the court related to what Father Pelypenko did with Vonsiatsky and what was said between them; what Kunze and Willumeit did and said in a trip about the country and what they did with Ebell; what Kunze and Ebell later did; none of which by any stretch of the imagination involves your petitioner unless he can be held to have participated in all of it by reason of the fact that his conversation with the priest established that he was a co-conspirator with the other four.

Your petitioner will leave the detailed consideration of the priest's version of the conversation to later discussion, but he wishes to emphasize that it seems fundamentally unjust that he should be convicted of a crime and sentenced to 10 years' imprisonment on the uncorroborated version of a conversation. He realizes that if this is true any one of the thousands of persons he has interviewed over the past years might have appeared as a witness against him and implicated him in a conspiracy, of which he knew nothing, merely upon a version of a conversation, product of a distorted memory or a pure fabrication. He would be unable to deny the conversation—he could merely deny its meaning. He could not corroborate his denial—neither could the witness against him corroborate his assertion. The question of veracity would be for the jury. If this is sound no man can be safe in a time when prejudice runs high. The professional informer would have his field day. He has flourished under similar conditions in many periods of history.

Your petitioner wishes to draw attention to what appears to him to have been a heedless display of zeal in trapping him that disregarded the commonly accepted rules of justice. It has already been pointed out that he appeared before the Grand Jury and told his story freely; that he permitted a search of his home and offered no objection to the removal of any articles desired by the agents of the government. When he was indicted the Government knew that he had asserted his innocence; knew that in all reason he could not and would not try to escape and yet he was held under sensational headline bail. At that time your petitioner had no knowledge of the evidence against him. He learned of it at the trial, and he realizes that the issue is narrowed to a question of veracity as between himself and Father Pelypenko, and neither is able to invoke corroboration. He realizes also that the priest had prepared a number

of things all of which when pieced together were used to direct suspicion to your petitioner. He had secured a slip of paper from the German Consulate bearing your petitioner's name; he had secured a slip of paper in your petitioner's handwriting bearing the name of Pastor Evers; he had secured the writing of two letters by Kunze bearing your petitioner's name as a return address; he had secured the writing of a letter by Kunze to your petitioner; he had secured a slip of paper from Dr. Haussmann bearing the name and address of your petitioner, and finally he had secured an interview with your petitioner and so phrased his version of the conversation that it was construed as making all of his other accomplishments competent evidence against your petitioner. The agents of the government obviously were in close contact with their informer. The letters and the enclosed envelopes sent by Kunze to the priest were photostated, and the priest came to Philadelphia on his several visits for the purpose of clinching the case. And finally having had his interview he appears to have reported it in such terms as to satisfy the government agents that they had trapped their prey.

It is probable that the priest did not tell them that he had been paid \$50 to secure a passport for Kunze. More probably he told them that your petitioner was to secure the passport, and he probably reported that your petitioner at the time of the interview had acknowledged receiving the passport pictures—otherwise why should the prosecution have pressed home the question three times in the course of his testimony in chief?

Another matter which the priest probably did not report in his first version of the interview was something that was relied upon by the Circuit Court of Appeals. It appears in the priest's testimony as follows—"I just asked how I can communicate with Kunze—he gave me the address of Dr. Ebell in El Paso." As of the time of the interview in the first half of September such in-

formation did not make sense. Kunze was to be reached through Bund Headquarters at Chicago. He did not start west on his tour until the beginning of October (Record, p. 95). He returned to Chicago November 3rd. Both Pelypenko and the Government agents probably knew that Kunze could be reached in Chicago.

In determining the question of veracity your petitioner wishes to point out that the Circuit Court of Appeals in describing Father Pelypenko stated that he "came to this country from Buenos Aires and entered the service of the Federal Bureau of Investigation. He was sent to the United States by the American Embassy in the Argentine. While in the Argentine he had furnished secret information to the British Intelligence and the American Embassy." The Court failed to remark that he had also dealt with the Germans and that as late as December of 1940 he had received a card personally from Prince Schaumbery-Lippe, adviser of the German Embassy in Buenos Aires (Record, pp. 5 and 7). On pages 43 and 44 he confirmed his relations to the German Embassy in the Argentine.

So it would appear that he had the confidence of the Embassies of all three governments and was working for all three. How he could have done that without double dealing is hard to understand. How he could justify a vocation calling for lying and deceit in view of the vows that he took as a priest of a great church is also difficult to understand. He professed to be a Ukrainian patriot working for the liberation of his country from the Bolsheviks. He was not interested in money, only an ideal (Record, p. 30) and yet he took \$50 from Kunze for services that he did not intend to render, and he informed against Vonsiatsky, a White Russian also working for the liberation of his country from the Bolsheviks. Moreover, the Government agents themselves seemed to have lost faith in their informer for after his visit to El Paso

in February, 1942, he was confined in the Immigration Station at Fort Howard, Maryland.

It would seem that the record of the priest would be such as to make him an unpredictable character, and yet the Government agents accepted his uncorroborated story as opposed to that of your petitioner who at least was a citizen, a resident of the country for upwards of twenty years, and one in whom those who knew him best had imposed confidence.

The Circuit Court of Appeals has summed up the evidence against your petitioner in several ways, but however it is summed it amounts to the addition of the evidence of "intent" to the evidence given by the priest. Neither alone, nor both together, should be held sufficient to establish that your petitioner knew of or participated in the conspiracy charge.

Jurisdiction.

The jurisdiction of this Court is involved under Section 347 of Title 28 of the United States Code, providing *inter alia* for writs of certiorari to the Circuit Court of Appeals.

Questions Presented.

I. Did the Circuit Court of Appeals err in deciding that the evidence against petitioner was substantial and justified the jury in rendering a verdict of guilty?

II. Ought the Circuit Court of Appeals to have affirmed the judgment of the District Court in view of the fact that it was based upon an attempt by an informer employed by the Government to entrap the petitioner, a law-abiding man, in the commission of a crime against the United States?

III. Was the Court of Appeals justified in deciding that petitioner had a fair trial?

Statutes Involved.

The only statutes involved other than Section 347 of Title 28 of the United States Code giving jurisdiction to this Court to grant the certiorari are Section 34 and subsection (a) of Section 32 of Title 50 of the United States Code, under which the indictment was drawn.

Reasons Relied on for the Allowance of the Writ.

The case presents serious questions in the administration of Federal criminal justice.

Those questions are as follows:

Where the charge is participation, with knowledge, in a criminal conspiracy, can a verdict of guilty be properly rendered where the only evidence of such participation rests on inferences from statements alleged to have been made by the defendant where there were other inferences to be drawn from the statement equally indicative of innocence, and there being no direct evidence of action by the defendant indicative of guilt?

And secondly, can a verdict of guilty be sustained where it rests not merely upon information obtained by an informer, but upon action on his part in endeavoring to secure the commission of crime by an otherwise law-abiding citizen? Under the decision of the court in *Sorrells v. United States*, 287 U. S. 435, ought not the District Court to have refused to exercise its judicial authority and disallowed the prosecution?

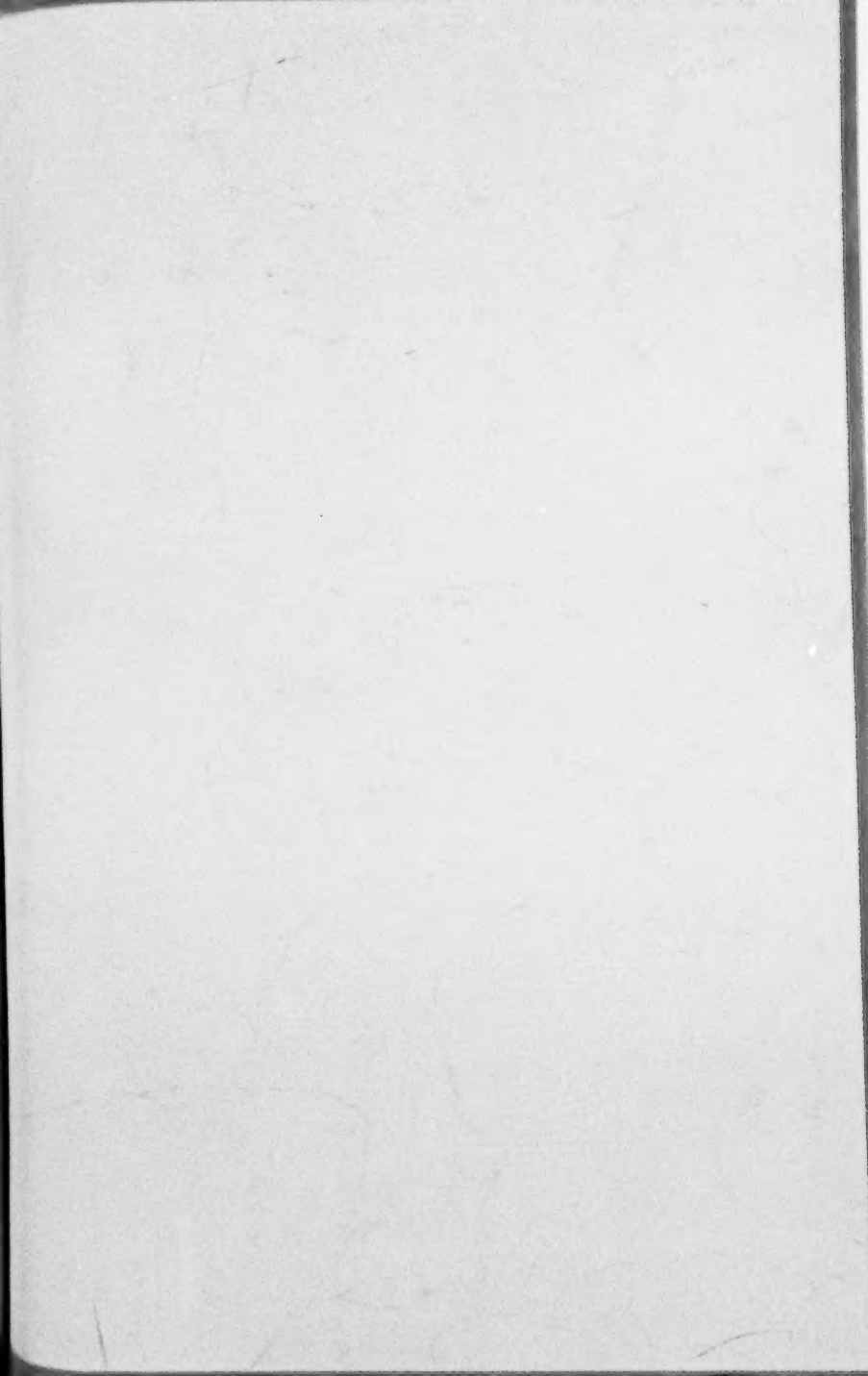
WHEREFORE your petitioner prays that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a complete transcript of the record and of all proceedings had therein; to the end that the cause may be reviewed by this Court, that

the judgment of the United States Court of Appeals be reversed and that your petitioner may be discharged from custody.

Dated May 27 , 1943.

KURT EMIL BRUNO MOLZAHN,
Petitioner.

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2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

Kurt Emil Bruno Molzahn,
Petitioner,
against
United States of America.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by the District Court except such as was expressed at various times in the course of the trial, and in the Court's charge, which is to be found on pp. 664-675 of the Record. An opinion was handed down by the Court of Appeals and it will be found in the Appendix to the Brief.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 347 of Title 28 of the United States Code, providing *inter alia* for writs of certiorari to Circuit Courts of Appeals.

Statement of the Case.

A statement of the facts is set forth in the petition and we shall endeavor in our argument to refer to the evi-

dence only as it is necessary to do so. The page references will be to the evidence as found in the printed Transcript of the Record.

Specification and Assigned Errors.

The assignments of error filed in the lower court will be found printed in the Appendix to this brief, and it is intended by the petitioner to press all assignments of error except Assignment No. 3. The assignments pressed raise the following issues:

1. The Court's admitting the alleged conversations which the witness Flatter said he had had with the petitioner on a trip to Europe in July, 1937.

2. The Court's permitting the witness Pelypenko to testify to the alleged conversations which he had with three of the self-confessed conspirators—Kunze, Vonsiat-sky and Willumeit—at the Bismarck Hotel in Chicago on July 26, 1941.

3. The Court's permission to the defendant Willumeit to testify as to what Kunze said to Pelypenko at the Bismarck Hotel in Chicago on July 26, 1941.

4. The Court's admission of Exhibits 34 and 35, two letters alleged to have been written by Kunze subsequent to the period of the conspiracy.

5. The Court's denial of the petitioner's motion for a directed verdict at the close of the Government's case.

6. The Court's denial of the motion for the petitioner at the conclusion of the trial for a directed verdict of not guilty.

7. The Court's denial of petitioner's motion to set aside the verdict and grant a new trial.

ARGUMENT.

POINT I.

The evidence was insufficient to support a finding that the petitioner knew of and participated in the conspiracy.

The indictment was drawn under Section 34 and subsection (a) of Section 32 of the United States Code, the applicable portions of which are quoted in the margin.¹

The substance of the indictment is stated in the petition and the indictment itself will be found printed on pages IX to XIV of the Record.

In order to prove the conspiracy and the relation of the petitioner to it, the Government called twenty-one witnesses. Several of them described the activities on the part of Vonsiatsky from 1934 down to the latter part of 1941 in Connecticut and in other parts of the world, directed to rescuing Russia, his native land, from the Bolshevik government. There was testimony as to Vonsiatsky's meetings with Kunze and Willumeit in Chicago, and in particular a meeting on July 26, 1941. Willumeit was put

¹ Sec. 32. *Unlawfully disclosing information affecting national defense.* Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: * * *

(The rest of the Section applies to offenses committed in time of war.)

Sec. 34. *Conspiracy to violate preceding sections.* If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of the Title 18.

* * *

on the stand and described a journey he had made with Kunze through the West, visiting places where the United States had defense bases and where munitions were being manufactured. There was evidence showing acts and declarations of the defendants Ebell, Kunze and Willumeit at El Paso, Texas, subsequent to the July meeting. The story of the doings of the four other men in relation to the conspiracy was complete without any reference to Molzahn. He was not shown to have participated in any of their meetings or in anything that they did, nor was he shown to have met and talked to them or communicated with any of them, during the period covered by the indictment—January 1, 1941 to December 6, 1941.

Of the entire twenty-one witnesses called by the Government, there was only one who saw, talked to or in any way communicated with the petitioner during the period of the conspiracy. This was a man named Pelypenko, and upon his testimony the Government's case had to stand or fall. The man was a Ukrainian by birth. Originally a priest of the Russian Orthodox Church, he had become a Roman Catholic priest under special dispensation as to celibacy. From 1933 to 1937 he had lived in Germany, and in the latter year gone to Argentina to minister to his fellow Ukrainians in that country. He professed, in addition to being a cleric, that he was an ardent Ukrainian patriot, seeking to free his native land from the Bolsheviks. In the Argentine he worked at first for the German government. Later he left the employ of the Germans to work for the British and American Embassies, reporting to them on German activities. Then later, at the suggestion of the American Embassy, he came to the United States carrying with him a card which he had been given by Prince Schaumberg-Lippe of the German Embassy (p. 7), and notes of recommendation that he had obtained from the German authorities (p. 37). He arrived in the United States on March 24, 1941, and was met at the wharf by an F.B.I. agent named Fellner (p. 26). His

work was to run down German activities in this country, and he reported from time to time to Fellner. That he did so on an important matter connected with the case was shown by the testimony of an F.B.I. agent named Bucher who testified (p. 634) that he had received from Fellner the photostats of two letters introduced in evidence by the government. Pelypenko further in describing his method of work said he reported orally to the agents of the F.B.I., they making notes of what he told them. Fellner for some reason was never called to the stand. Pelypenko's expenses were paid by the Government, and he received from it no other compensation (p. 30). He said he was not interested in money; he worked for an ideal (p. 30). At the time of the trial he had been brought to Hartford from the Immigration Station at Fort Howard, Maryland, where he had been interned for a considerable period of time. His work for the Government in the present case was under-cover work—the work of an informer pretending to be in sympathy with the government of Germany.

Pelypenko first met the defendant Willumeit in Chicago in April, 1941, having been introduced to him by a fellow Ukrainian, and in May, 1941, he went to Philadelphia and called on the German Consul. He asked to become acquainted with people who were aiding the German propaganda, and he said the Consul told him that the petitioner was "one of our most important workers"—"one of the closest co-workers of the German Consulate." The Consul wrote down on a piece of paper petitioner's name and address, as well as that of Rev. Herman H. Koenes, a priest of the Roman Catholic Church (pp. 7-8; 383). We do not know whether Pelypenko called on Father Koenes, but he testified that he did call on the petitioner, and asked to be connected with the German Embassy in Washington (p. 8). Molzahn was reported to have said he was acquainted with a certain Baron Von Geinanth, but suggested that the connection with the German Embassy be

made through another worker, a Pastor Evers of Baltimore, and he gave him the address of this pastor. Molzahn wrote the name and address of Pastor Evers on a card and gave it to Pelypenko. Asked what else was said at the interviews, Pelypenko answered (p. 9), "I asked the pastor what he thought about the aid of the Ukrainians in the German aims."

Q. What did he say? A. He said that the Ukrainian aid may be directed in three directions.

Q. Anything else? A. First direction: propaganda against war and against the warring authorities in Washington. Secondly: to lead propaganda amongst Ukrainians concerning independence of the Ukraine. Thirdly: to give information about factories and military equipment.

Q. By the way, what language did you and the defendant Molzahn use when you had this conversation? A. In German.

Q. You speak German, do you, Father? A. Yes.

Q. What else was said by the defendant Molzahn at that time, if anything? A. At that time we spoke very little, just about this."

Pelypenko went to Baltimore and called on Pastor Evers and told him of his visit to Molzahn, and Pastor Evers directed him to the German Consul in Baltimore, who in turn gave him a card with the address and telephone number on it of the German Embassy in Washington. He later called at the German Embassy in Washington and saw a man named Von Haydn, who was Secretary of the Embassy. Von Haydn later visited him at his hotel (p. 10).

There was no implication of criminality in the Consul's speaking of Molzahn as one of his best workers for Molzahn as a German Lutheran pastor ministered to many poor persons and was constantly applied to by persons who had recently come from Germany and who needed

work. It was only natural for him to keep in touch with the Consul and collaborate with him also in maintaining friendly relations between Germany and the United States. He was naturally for peace between the United States and Germany, and what was felt by many Americans at the time was felt intensely by him as a man who had come from Germany since the last war, whose parents were still alive in that country and who had many other relations there—he hoped and prayed that peace might be preserved. And when Pelypenko went to him, if the conversation occurred as the priest narrated it, it was natural that petitioner should have talked of “the aid to the Ukrainians in the German aims.” There was nothing illegal in this in May, 1941, or that the aid might be given through propaganda “against war and the warring authorities in Washington,” and the propaganda among the Ukrainians might well concern the independence of the Ukraine. What did he mean, however, when he spoke of giving information about factories and military equipment? The matter is stressed by Judge Hand in the opinion of the Court of Appeals. He argues that it meant that in May, 1941, the talk between the petitioner and Pelypenko bore upon information relating to our national defense, but the conversation was in broken German, and we do not know the actual words that were used. It was more than a year afterward that Pelypenko repeated it in court, and when he repeated it he spoke in his native Russian. The words had to be translated by an interpreter into English. If all that Pelypenko testified to as having been said by Molzahn was said and covered by the words “to give information about factories and military equipment,” it was indeed a slender thread on which to hang an inference of Molzahn’s guilt. The Government did not contend that petitioner entered the conspiracy in May. It did not then exist. Pelypenko had met Willumeit, but the meetings that he testified to with the other defendants in Chicago did not occur until July. The

conspiracy did not take shape until a meeting at the Bismarck Hotel on July 26, 1941.

Pelypenko returned to Chicago and had frequent interviews with Willumeit, finally being present at a meeting of Willumeit, Kunze and Vonsiatsky on July 26, 1941, already referred to. At that meeting, according to Pelypenko's testimony, Kunze suggested that Molzahn would help him in securing passport papers to be used by Kunze in getting into Mexico. Kunze stated, according to Pelypenko's testimony (p. 23) that if he (Pelypenko) would be an intermediary between Pastor Molzahn and himself in connection with getting a passport, he (Kunze) would be very thankful. He said that he would write a letter to Pastor Molzahn and tell him of this.

It is to be noted that all the conversations between Pelypenko and the conspirators in Chicago were in German, as had been the conversation Pelypenko said he had had with the petitioner.

Pelypenko said he went to New York, and later received a letter from Kunze in German. The letter was dated July 31, 1941, and the translation of it put in evidence reads as follows (p. 15):

"Dear Comrade Reverend Pelypenko: Enclosed the best photograph that I could obtain so quickly. In the event it can't be used, I will send you a somewhat larger one, which, however, will require two more days. I have written to Pastor M. Again best of thanks for your help. We are all fighting for the liberation of our people. Heil. Yours, Wilhelm Kunze."

Pelypenko then went to Philadelphia and called at the office attached to Molzahn's church, but was told that Molzahn was not there. The person in the office gave him the address of the house next door to the church, and wrote down on a piece of paper, "Rev. K. E. B. Molzahn, 228 N. Franklin Street, Philadelphia, Pennsylvania." The man told Pelypenko that if he had anything he should send

it to that address. He said that the pastor was on his vacation and he could not give him his address, meaning presumably the place where he was at the time. Pelypenko, according to his testimony, left two small photographs of Kunze in an envelope with the man and asked him to send it to him (pp. 16 and 17).

Pelypenko returned to New York and went again to Philadelphia, this time carrying with him another letter which he had received from Kunze. It bore the date August 2, 1941, and read:

"Dear Friend Reverend Pelypenko: Enclosed at last are the correct photographs. I hope that everything is going all right. Heartiest of greetings and thanks. Heil. Yours, Wilhelm Kunze." (p. 15)

In the second letter there were three photographs.

Pelypenko went to Philadelphia, again saw someone, according to his testimony, in Molzahn's office, and left two of the three photographs with him, Molzahn still being away from town. He returned to New York, and about six weeks afterwards went to Philadelphia for the third time, and then, according to his testimony, saw petitioner (p. 17). Pelypenko declared he then had a conversation with the pastor and the testimony of Pelypenko with regard to this conversation was the foundation of the Government's case. The testimony is in the record, but that the court may see it in full we here repeat it.

"Q. After you received these two letters which have been admitted in evidence, Government's Exhibits 15 and 17 I believe they are, where did you go?

A. After I received the first letter I went to see Pastor Molzahn in Philadelphia.

Q. Did you have both of those letters, Government's Exhibits 15 and 17, with you when you went to see the defendant Molzahn in Philadelphia?

A. Only one. When I received the first I immediately went to see Pastor Molzahn.

Q. Do you remember what day of what month it was when you went to Philadelphia?

A. I do not remember.

Q. Do you know whether it was in July or August?

A. Second or third of August.

Q. Did you go to the defendant Molzahn's home or to his office?

A. I rang the bell at his residence. No one answered. And then I went to his office.

Q. Did you find him at his office?

A. I found a certain person whose name I do not know. He was sitting there and writing. He told me that Pastor Molzahn was on his vacation at present.

Q. Did you leave anything at that place for the defendant Molzahn at that time?

A. I asked this person sitting there to give me an address. He told me he was not able to do so as per order by Pastor Molzahn.

Q. Did you leave anything with that man for the defendant Molzahn?

A. Then I left two small photographs in an envelope with him, photographs of Kunze, and asked him to send it to him.

Q. Were those the same photographs of the defendant Kunze that you received in the envelope which has been admitted as Government's Exhibit 15?

A. In the first letter.

Q. And you kept one of those pictures which you have identified here today; is that true?

A. No. There were only two, and I gave him both.

Q. I see. The picture which you have identified here today came in the other envelope; is that it?

A. That was in the other envelope.

Q. I see.

A. This person gave me his address and told me I can send anything I need to that address.

Q. To the defendant Molzahn's address?

A. Yes.

Q. I show you that piece of paper and ask you if you have ever seen it at any time.

A. He wrote this address for me and told me if I have anything I should send it to him.

Q. You don't know the name of this man?

A. No.

Q. But he was in the defendant Molzahn's office; is that it?

A. Yes, he was at the office.

MR. DODD:—We offer this.

(Government's Exhibit 19: Paper with address.)

MR. DODD:—May the record show this exhibit 19 bears the words 'Rev. K. E. B. Molzahn, 228 North Franklin Street, Philadelphia, Pennsylvania.'

Q. Did you make another visit to the defendant Molzahn's office?

A. In a few days I received another letter with other photographs, and I once again went to Philadelphia, because this man in the office said that possibly Pastor Molzahn will return by Saturday. I did not see the Pastor again. In that manner I left two photographs with him and I left one with myself.

Q. Sometime later on did you see the defendant Molzahn in Philadelphia at his office or home?

A. I saw him in approximately a month and a half.

Q. Now, when you saw him on this later date, did you have some conversation with him?

A. Yes.

Q. Where was that conversation held, again?

A. At his office.

Q. Tell us what was said by the defendant Molzahn at that time to you.

A. That he received a letter from Kunze and did what he could.

Q. Did he say anything about pictures?

A. I showed one letter from Kunze with his back address on it.

Q. Now, what did he say when you showed him that envelope from Kunze?

A. He tore this address off and told me to be careful with it.

Q. What did he say about Kunze, if anything, right then?

A. That Kunze was not very careful in this case. He said that Kunze was at his residence a few times. He is a good man, but he is not careful.

Q. Did he call him any particular name?

A. He called him a dunce.

Q. He called Kunze a dunce?

A. Because he wasn't careful.

Q. Did he say anything about these photographs that you had left?

A. At that time there was no conversation.

Q. At that time?

A. I just asked how I can communicate with Kunze.

Q. What did he say?

A. He gave me the address of Dr. Ebell in El Paso.

Q. The defendant Wolfgang Ebell.

A. Dr. Ebell.

Q. Anyway, did you make a written note that time of the address that the defendant Molzahn gave you as the address of Ebell in El Paso?

A. I tore a piece of paper off the desk there and wrote the address down.

Q. Is this the note you made at that time (handing to the witness)?

A. Yes, that is what I wrote. Up to this time I never heard of this name.

Q. You never heard of Ebell before?

A. No.

Government's Exhibit 20:

MR. DODD:—May the record show that Exhibit 20 bears the legend 'Dr. W. Ebell, 111 N. Mesa Street, El Paso, Texas.'

(Mr. Dodd handed Government's Exhibit to the jury.)

Q. Did you and Molzahn have any conversation about how Kunze would get out of the country?

A. I said that he expects to leave and Molzahn said, 'Yes, I know.'

Q. Was there any talk between you and Molzahn about what Kunze would take with him when he left the country?

A. I stated that this business was very important, because he has with him important papers, and he said, 'That I know.'

Q. Did you have any further conversation with the defendant Molzahn about the photographs?

A. I didn't speak to him, because other persons had been waiting for him and my talk with him was very short. In connection with this letter, Pastor Molzahn told me that in his correspondence with Baron Geinanth, he has had an unfavorable experience with the post office, because of the back address.

Q. Did you ever at any time talk with the defendant Molzahn about these photographs that you left?

A. No, I never spoke. I considered this business finished."

Surely this testimony did not show that Molzahn had knowledge of and participated in the conspiracy. Clearly, the needed evidence was lacking.

It will be seen that the one conversation as narrated by Pelypenko left to pure conjecture the question of what was meant by Molzahn's answers. There was no evidence that Molzahn knew of the purpose for which Kunze had his photographs taken, nor was there any evidence that

he saw the photographs or had them in his possession. Taking Pelypenko's statements at their face value, the photographs had only been left at Molzahn's office for him to see, and there was not a particle of evidence that he had ever seen them. If Pelypenko was to be believed, Molzahn had said "that he received the letter from Kunze and did what he could," but there was no evidence as to what he did. There was evidence that he stated that he had knowledge "that he (Kunze) expects to leave, that his business was important, and that he had important papers," but there is no evidence that Molzahn knew why Kunze was leaving, what his business was, or what the important papers were. Adding it all up, there was nothing in the conversation to show that Molzahn was in a conspiracy with anyone to violate the law.

It should be noted at this point that Judge Hand misread the testimony in a significant particular. The priest's testimony relative to the receipt by him of Ebell's address from Molzahn was to the effect that Molzahn had given him the address but that he, the priest, had written the address down—not Molzahn. So he produced in court as corroborating his own story a memorandum written by himself.

Judge Hand points out that the admissions by the petitioner were not made after the crime was completed, but in the course of the alleged conspiracy, and therefore did not have to be corroborated, and the Judge cites as authority for his conclusion the recent case of *Warszower v. United States*, 312 U. S. 342 (1941). In that case, as the Court may remember, it was pointed out that the rule requiring corroboration of confessions was based on the necessity for protecting the administration of the criminal law against errors in convictions based upon untrue confessions alone, and that where the admission of guilt was made prior to the crime the danger does not exist. Therefore the Court did say, speaking through Mr. Justice Reed, that such admissions do not need to be corroborated; but surely the Court would not apply this reasoning to the alleged admissions made by Molzahn.

No one would press the rule as far as that. Neither the Judge who presided at the trial nor the Circuit Court of Appeals took the position that without any corroboration at all the case could have been rightly submitted to the jury, and the question really raised by the case is whether or not there was substantial evidence that in any way corroborated the inferences to be drawn from the answers made by Molzahn to the question asked him by Pelypenko. We contend that there was no such substantial evidence.

The facts in the Warszower case were absolutely different. The defendant was indicted for the use of a passport for the purpose of entering the United States. The Government claimed that the passport had been secured through false statements with respect to the defendant's name, citizenship, and place of birth, and to establish that the man was not a citizen of the United States and that he had resided abroad the Government put in evidence the repeated statements of the defendant to the contrary. There was a manifest of a steamer which had arrived in Philadelphia as far back as March 27, 1914, which stated that a man named Welwel Warszower, who was proved to have been none other than the defendant, was a citizen of Russia, that he had never been in the United States before, and that he had been born in Russia. The Government also proved that in 1917 the defendant had registered for the draft under the name of William Weiner; that he had never applied for naturalization under his own name or the names of Weiner or Wiener, which he had on occasion used. And it proved that in 1936, when applying for a passport in the name of Robert William Wiener, he had submitted a certified transcript of an entry in the Atlantic City birth record that a person of that name was born there September 5, 1896, and at the trial the Government proved the entry to be a forgery. If ever there was a case in which there had been corroboration out of the defendant's own mouth, it was this Warszower case, and we therefore can fully bow to the

ruling of the court with respect to admissions made by defendants accused of crime without in any way yielding our contention that the evidence in the Molzahn case should not have been submitted to the jury on the bare admissions made by the defendant in his conversations with Pelypenko.

There was only one source through which Molzahn could have secured information relative to the conspiracy, and that was the letter Kunze was supposed to have sent him, and the contents of the letter were not before the jury at the close of the Government's case. Pelypenko's testimony did not cover the contents of the letter. What the letter did contain was brought out afterwards and in the evidence for the defense. There was nothing in the Government's evidence that showed the contents of the letter, and the judge should have directed a verdict of acquittal at the end of the Government's case. The defendant made the necessary motion but it was denied. An exception was allowed and the denial of the motion forms the subject of the petitioner's first Assignment of Error.

ERRORS OF THE TRIAL COURT IN ADMITTING EVIDENCE OFFERED BY THE GOVERNMENT.

We shall take up these errors in the order that they occurred at the trial. They are the errors complained of in Assignments No. 5, Nos. 2 and 4 (which we shall consider together), and No. 6.

We do not press the error complained of in Assignment 3. At the trial objection was made to the admission of certain documents offered as credentials to show that Pelypenko was an ordained Catholic priest, but as we now see it the court's action in admitting the evidence was immaterial. It seemed to us at the time that if the man was a priest the Government was not justified in asking him to act a part and deceive, even law-breakers, as to the part he was playing. If on the other hand

he was not a priest, but an adventurer who pretended to be one, the jury ought to have known it. On looking into the matter further we came to the conclusion that the judge was right in admitting the documents in evidence, and in the Court of Appeals the matter was not pressed.

The Error Complained of in Assignment No. 5.

This was the error in admitting the alleged conversations which the witness Flatter said he had had with Molzahn on a trip to Europe in July, 1937, because the conversations which were alleged to have been had occurred about 4 years prior to the period of the conspiracy alleged in the indictment. The defendant objected to the evidence and excepted to the court's ruling (p. 62) and the conversations appear on pp. 63-73.

The evidence was offered by the Government for the purpose of showing Molzahn's "state of mind" in 1941. But the evidence was to conversations with Molzahn in 1937, when the feeling of a German born American citizen might well have been altogether different towards the Nazi government. Such a German born citizen might well have been in sympathy with the Nazis in 1937 and not in sympathy with them in 1941, after the abuses of the Nazi regime had increased, the invasion of Czechoslovakia and Austria had occurred, and worst of all, the utterly unjustifiable invasion of Poland. England did not go to war with Germany until 1939, and the whole international set-up in 1937 was different from what it was in 1941. Molzahn might well in 1937 have had an entirely different view of the Nazi government from what he had in 1941.

And what was the testimony of the man Flatter? He had seen Molzahn only on a voyage to Europe and did not know him otherwise. Assuming the conversations were true, assuming that while on shipboard Molzahn had worn a Nazi button in 1937 and expressed sympathy with the Nazi party, it was a far cry to argue that he would for this reason have gone into a conspiracy to

injure the United States government in 1941. True, he had a brother-in-law, Dr. Behrensmann, living at Altona near Berlin, and through a subsequent witness whose testimony was introduced by the Government, a man named Kempner, a professor at the University of Pennsylvania, it was shown that Dr. Behrensmann was a leading field officer of the German police—the Gestapo (p. 87). Even so, it was no proof that Molzahn four years afterwards would have committed the crime charged against him by the Government.

Furthermore, we submit that the evidence was offered by the Government not to show intent, but rather “state of mind,” which is something quite different, and that unless the Government was prepared to show some definite act on the part of Molzahn, the evidence as bearing upon the man’s “state of mind” had no probative value whatever. Molzahn was not accused of having a “state of mind” but of participating in a conspiracy. The use of the evidence by the Government to prove participation in the conspiracy was like an attempt to hang a picture on a wall without a hook to hang it on. The picture would of course fall to the ground, there being nothing to hold it up. And so in the present case no act had been proved on the part of Molzahn to sustain the charges against him. The Government in seeking to introduce the defendant’s conversations with Flatter relied upon the cases that had arisen under the Espionage Acts of 1917 and 1918 where the courts had allowed with great latitude statements made by the defendant before or after the statement on which the man was prosecuted. Had it been the man’s intent to interfere with enlistment or recruiting, or to create insubordination in the land or naval forces of the Government? To prove his intent it was proper to show what he had said or written on other occasions. In these cases, however, the man had spoken or written something on account of which he was being prosecuted, and within certain limits it was admissible to prove prior or subsequent statements in order to prove

intent. In the present case, however, there was no proof of anything that had been done or said by Molzahn, and what he had said on the prior occasion was clearly offered in evidence to show that there was a likelihood that he would later have participated in the conspiracy. The decisions relied on by the Government were therefore inapplicable, and even if the conversations had occurred later than 1937 there would have been good reason for excluding the evidence.

The Errors complained of in Assignments 2 and 4.

These errors may be considered together.

The error complained of in Assignment 2 was that of the trial judge in permitting the witness Pelypenko to testify to alleged conversations which he said he had had with three of the conspirators, Kunze, Vonsiatsky, and Willumeit, at the Bismarek Hotel in Chicago on July 26th, the conversations being hearsay as to the defendant and there being no proof that up to the date mentioned, Kunze, Vonsiatsky and Willumeit had formed or been engaged in the conspiracy, or that Molzahn knew of it and was participating therein.

The error complained of in Assignment 4 was that the court permitted the witness Willumeit to testify to what Kunze said to Pelypenko concerning Molzahn at the Bismarek Hotel in Chicago on July 26, 1941. The testimony objected to was as follows:

“Q. What did Kunze say to Father Pelypenko about the defendant Molzahn at this meeting?

“Q. Will you answer that question, doctor? A. Mr. Kunze told Father Pelypenko that he was going to forward the passport pictures either to him or to Pastor Molzahn, that he was going to write to Pastor Molzahn that he wanted Pelypenko to meet Pastor Molzahn personally, and that Pastor Molzahn would take care of everything.” (P. 95.)

Although Willumeit was one of the actual conspirators, and not an informer as was Pelypenko, the assignments made will be considered together, the action of the trial court in admitting the testimony having been erroneous in the main, as we contend, for the same reasons.

The conversations complained of appear on pages 10 to 12 and on pages 23 and 95 of the Record. The exceptions taken to the evidence are noted on pages 12 and 94.

The conversations, as we have said, were held at the Hotel Bismarck in Chicago on July 26, 1941. Vonsiatsky, Willumeit, Kunze and Pelypenko were present. Molzahn not only was not present but he had no knowledge of the meeting whatever. So far as the Record discloses, he was at his home in Philadelphia or on a vacation in the vicinity. Nevertheless, the conversations were offered in evidence as against him to show his connection with the conspiracy.

In *Kuhn v. United States*, 26 F. (2d) 463 (1928), C. C. A. 9th Circuit, the court said:

"Giving the rules of evidence in conspiracy the widest reasonable latitude, we are aware of no principle under which the declaration of one conspirator to another is competent to establish the connection of a third person with the conspiracy."

In the recent case of *Glasser v. United States*, 315 U. S. 60-74 (1942), the Supreme Court, speaking through Hon. Justice Murphy, reaffirmed the rule laid down in the *Logan* case and pointed out that such declarations "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. *Minner v. United States*, 10 Cir. 57 F. 2d 506; and see *Nudd v Burrows*, 91 U. S. 426, 23 L. Ed. 286. Otherwise heresay would lift itself of its own bootstraps to the level of competent evidence."

We submit that the trial judge ought not to have admitted the evidence in question.

The Errors Complained of in Assignment No. 4.

The error here, as we submit, was in admitting in evidence over the defendant's objection photostatic copies of two letters alleged to have been written and signed by Kunze in Mexico on December 8, 1941, the day after Pearl Harbor and after the alleged conspiracy had ended. We urged that the date of these letters made them inadmissible.

The rule was laid down in the leading case of *Logan v. U. S.*, 144 U. S. 263; 36 L. Ed. 429 (1891), as follows:

"Doubtless in all cases of conspiracy the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *U. S. v. Gooding*, 25 U. S. 12 Wheat 460, 469. But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible as evidence against the others."

Logan v. U. S. has been followed in a great number of cases, among the more recent of which is *U. S. v. Groves*, 112 F. (2d) 87 (C. C. A. 2d Cir. 1941).

In *Gambino v. United States*, 108 F. (2d) 140 (C. C. A. 3rd Cir.) 1939, the court said:

"If the agency is terminated or the conspiracy is over there is no longer any authority in the agent to act on behalf of his principal or of the accomplice to act on behalf of his co-conspirators. This is part of the substantive law of evidence. The error in treating such assertions as part of the *res gestae* was discussed

by Thayer in XV American Law Review 80. It, therefore follows that assertions made by an accomplice after the termination of the conspiracy come within the prohibition of the hearsay rule and are inadmissible. Many years ago the Supreme Court so ruled in *Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429."

According to the witness Myers (p. 111), an F.B.I. agent assigned to El Paso, Texas, the originals of the two letters we are now discussing had come to him about December 10th or 11th "from a confidential source" (p. 112)—presumably intercepted in the mail. Marked for identification when Myers was on the stand, the photostatic copies were later put in evidence by the Government just before the close of its case (pp. 145-147). The letters were in German, and translations of them were read to the jury. The first letter did not concern Molzahn in any way, but the second, unexplained, was greatly prejudicial to the defendant, for it had in it a reference to "Kurt" which the jury would have every reason to believe meant Kurt Molzahn, the defendant. Both letters were in longhand, and the writing was proved to be that of Kunze. The second letter was offered by the Government without the note or postscript at the foot of it. The first of the two letters, as translated, read as follows:

"Mexico, December 8, 1941.

"My dear Anastase Andreavich:

"Roosevelt finally has what he thinks he wants, but before long he will have it 'in the neck.' If the Japanese war had waited a few weeks more I would have been in Japan. As it is, I shall have gone on in another direction by the time this letter reaches you.

"The Atlantic crossing by air which I originally had in mind would cost \$2600 more than I have now

and would require months of waiting. Another method of travel, the only one left open, will require about \$1000 more than I have.

"There can be no going back for me any more, and the farther away I go the more difficult it will become to send me money. Please send what you can to: Dr. Wolfgang Ebell, 111 Mesa, El Paso, Texas. He is my very good friend, and I have asked him to forward money or mail intended for me to another address. Now, please do not use my name on money orders or letters, but only his. Do not write much, as his mail is censored.

"I am being very careful with my money and still have about two thirds of the travel-sum I originally took along. I shall certainly save what I can for you of whatever money you send me.

"Dove strechiv Mosquirer slawa Ronjir. H.H.

"Yours,

WILHELM GERHARDAVICH."

This letter, as will be seen, was an appeal to Vonsiatsky for more money—money needed by Kunze for his expenses in Mexico and his leaving that country.

The second letter presumably had been enclosed in the same envelope with the first, for it was signed by Kunze and the date was the same as that of the first letter, and "Mexico" was in the place line. As translated, it began, "My dear Ferdinand and Wolf." Who the "Ferdinand" was did not appear, but counsel for the Government, in reading the translation, made it clear that by "Wolf" was intended Wolfgang Ebell, the conspirator named in the indictment who lived at El Paso, Texas. The letter contained directions as to how the other letter should be forwarded to Vonsiatsky and how, if an answer came from him, it should be handled so as to reach Kunze.

The purpose of introducing the second letter was clearly to show Molzahn's connection with the conspiracy, as,

unexplained, it showed that he had allowed himself to be used as a forwarder of mail between Kunze and Vonsiatsky, two of the conspirators. The implication could not be denied.

As a matter of fact, hundreds of friends of the pastor were greatly disturbed by the letter when they saw it mentioned in the newspaper accounts of the trial. It seemed to clinch the case and show that Molzahn was guilty of having been a go-between. This must have been the effect produced on the jury when counsel read to them the translation of the letter. Quoting from the record, this is how he read it:

“Now, I will read for your attention Government’s Exhibit 35, which has been admitted in evidence as a full exhibit. This letter is written in German. It likewise is dated December 8, 1941, and it bears the place line ‘Mexico.’

“‘My dear Ferdinand and Wolf,’ and I recall again to your attention that Wolfgang is the first name of the defendant Ebell. ‘The best of thanks for your friendly postcard. Rosenfeld has his war at last. It will cost him his head. The sudden outbreak of war has prevented my trip to Japan and it will be smart for me to keep going. Please forward the enclosed letter’—the letter I just read you—‘from El Paso on by air mail after you have read it, and if desired, change the address, W.E. 111 N. (Mesa) but please be careful in taking the letter over the border. Should you get a reply, then send mail or money from Jaurez to Kurt, per his name’—Kurt is the name mentioned here. ‘He will then forward the things.

“‘I have not yet noticed whether the Yankee authorities even know that I am out of the country, but caution is necessary. In the meantime, many Christmas greetings and best wishes to you and your family. Many, many thanks for your friendly help. Heil Hitler. Yours, Wilhelm Kunze.

“ ‘This enclosed letter goes to Anastase A. Vonsiatsky, Thompson, Connecticut’ .”

It will be seen that counsel for the Government went out of his way to stress the name “Kurt.” It will be seen that when he came to the passage, “Should you get a reply, then send mail or money from Juarez to Kurt, per his name,” he paused to say, “Kurt is the name mentioned here,” and then, renewing his reading of the letter, continued with the words, “He will then forward the things.” This pointed reference to a “Kurt” clearly informed the jury that the man referred to was the Kurt Molzahn of the case. He was the man who would receive the money from Vonsiatsky and forward it to Mexico. The letter must have convinced the jury that Molzahn had allowed himself to be used as a “letter box” for the conspirators for the letter clinched the matter, and there was only one meaning to be drawn from it. Molzahn was guilty. He had taken part in the conspiracy. Although the letter had been written after the period of the conspiracy, it had been admitted by the judge as evidence in the case, and that seemed to settle the matter. Twelve days later, at the close of the defendant’s case, the reference to “Kurt” was specifically explained, but for the time being there was nothing to be done but submit to the Judge’s ruling in admitting the evidence.

The Evidence for the Defense.

We did not in the Court of Appeals go fully into the evidence for the defense, as we felt it was not properly before the Court, it being for the Court of Appeals to determine only whether there was sufficient evidence to go to the jury on the question of the defendant’s participation in the conspiracy. His Honor Judge Hand, however, has accepted what he thinks was evidence of the defendant’s guilt outside of the testimony of Pelypenko, and in so doing has made nothing of the mass of evidence which

showed the contrary, and to which the attention of the Court should be drawn, if only to do justice to our client.

A large number of responsible persons who had been asked by us to come to Hartford from Philadelphia, Molzahn's home city, testified in his favor, and they spoke from a background of long intercourse with Molzahn, in most cases from month to month and year to year since he had come to this country from Germany. One, a Judge of the State Court of Common Pleas for the County in which Johnstown is situated, had become acquainted with him when he came to this country and was called to Johnstown as pastor of the local Lutheran church. He had served as pastor of the church from 1924 until 1929, when he was called to the pastorate of Old Zion in Philadelphia. This Judge of the Common Pleas Court, Hon. Charles C. Greer, spoke in the highest terms of the defendant and of his loyalty to the United States. He was the first of the witnesses called by the defense, and all of them testified to Molzahn's sincerity, his generosity of character, his devotion to his calling as a minister, and his unquestioned loyalty to the United States Government. He was the last person in the world to have entered into a conspiracy to injure our nation for the benefit of other governments.

We had opposed the introduction of the witness Flatter's testimony on the ground that the evidence of the defendant's "state of mind" was too remote, the evidence, if true, showing "state of mind" full four years before the year of the conspiracy, but the Court admitted the evidence, and it was therefore for us to combat it. Molzahn did remember having met the man, but his conversations with him were entirely different from those narrated by the witness. The pastor very definitely had not worn a Nazi button on the voyage or shown a sympathy with the Nazi government. The steward had told him that he was having difficulties with Mr. Flatter and did not seem to be able to please him. Would he not speak to Mr.

Flatter? He had done so, and with the kindest intentions given him a card to Dr. Behrensmann, a brother of Mrs. Molzahn, who was adviser to the government police at Altona, near Berlin. Flatter had told Molzahn that he had been persecuted by the Nazis and Molzahn thought that he could help him. Molzahn himself was in no way connected with the Nazi party, but it happened that he knew Dr. Behrensmann and that he might help him. The construction put upon this act of kindness was entirely unwarranted by Flatter, who seemed in some way to have got the idea that Molzahn was himself a creature of the Nazi government.

As respects the other evidence of "state of mind," the books, pamphlets and other things found in Molzahn's house, there was nothing in this to show Molzahn's sympathy with the Nazis, unless the mere having the things in his possession, which any educated man of German birth might have had, proved his disloyalty to our country. It was inconceivable that a man who had been guilty of entering into such a conspiracy as was charged in the indictment would have not destroyed the things long before. He would not have waited for the F.B.I. men to pounce upon him and the fact that he had the things in his house was evidence of his innocence rather than his guilt.

Molzahn had never been connected with the Bund. He had for a time subscribed to its publications, for he wanted to know about it, but becoming disgusted with it he had not kept up his nominal subscription. He had always opposed meetings of it or other German societies in his church, and when asked by a German society for leave to hold such a meeting, he had laid down a threefold rule: that only the flag of the United States, the Red Cross flag or the flag of the church should be displayed, that there should be no men in uniform at the service, and finally that the only speakers should be ordained ministers of the church. These conditions did not find favor with

the particular society and the matter was not pressed. As showing his opposition to the Bund, he had gone so far as to ask a member of his vestry to resign because of membership in it. This was testified to by the witness Kaupp (p. 269), who said that Molzahn had urged him to continue his work as vestryman and had given as a special reason for his doing so that he (Molzahn) had been obliged to ask another vestryman to resign because of his membership in the Bund.

Actions speak louder than words, and Molzahn's anti-Nazi attitude was well shown in one in particular. From the first he had been liberal and generous towards Germans of the Jewish race. When he had left his parish at Johnstown for a few months' visit to Europe to see his parents, he had recommended as a person to fill his pulpit a half-Jew whom he had known in Germany as a student, and who had recently come from that country. The Sister attached to Old Zion Church—it is the practice of Lutherans to employ nuns, known as Sisters, in their churches—was of Jewish parents, and had Jewish relations in this country. When asked to help young men of Jewish birth studying for the ministry in this country, he had gladly cooperated and helped one young man, even to the extent of assisting him with money (p. 187). Rudolph Rosenheimer, an insurance man living in Philadelphia, a Jew, was one of Molzahn's devoted friends, and testified to his long friendship with the pastor, expressing not only his admiration for him but a firm belief in his loyalty to this country. He had been at a meeting in one of the principal synagogues of Philadelphia where a Rabbi from New York and Molzahn had both spoken, and he had been for years a member of a small luncheon club at a meeting of which Molzahn had protested upon one of the members calling attention to his (Rosenheimer's) presence as a Jew. Most interesting of all was Molzahn's long friendship for a man named Waldemar Alfredo. Originally an actor in Germany, he had come to this

country in 1912 and been naturalized in 1924. He ran a restaurant in Philadelphia known as Alfredo's Theatre Cafe, and his parents were Jews in Germany. Molzahn had known him for many years and gone to his restaurant, and sent poor people there who were in need of food. Alfredo really loved the defendant, and had had a child christened by him. The Nazis had come to his restaurant, he said, and wanted to sing their songs there, so he put them out, and they started a boycott against the place. He had later left Philadelphia, and curiously enough gone to Connecticut to support himself, and when he heard of Molzahn's prosecution and of the trial that was going on in Hartford, he wrote to Molzahn expressing his sympathy and hoping that all would come out right. We asked him to appear as a witness for the defendant, and in this way Molzahn had the benefit of his testimony. He remembered the meeting at the synagogue in Philadelphia when Rabbi Malina came there from New York, and he explained that the meeting was for Jewish Relief in this country. Pastor Molzahn had spoken at the synagogue and said that the Jewish people in Germany were "treated wrong" and that he felt that Germany "was very sick, very sick," but he was sure the country would come to itself again. The man did not speak good English, but this was his recollection of what Molzahn had said at the meeting in the synagogue, at which there were some 200 people present, representing all faiths. When at another time the witness had gone on an invitation to Molzahn's church to attend an evening sociable, and some of the visitors had told him what a "nerve" he had to come there, he explained the situation to Pastor Molzahn and Molzahn had taken his part and brought him to the guest table (p. 369). Indeed, there are few Christian pastors who could show such a fine record as Molzahn's in their treatment of the Jews.

Judge Hand refers to Molzahn's association with a man named Kessemeier, as showing his Nazi sympathies,

but what were the facts as shown in the testimony? Kessemeier, an avowed Nazi, was the agent of the North German Lloyd Company in Philadelphia. Molzahn of course knew him and had gone to him for steamship tickets when he and his wife went to Germany. In 1934, Molzahn had gone on a cruise got up by the steamship company to the West Indies, and been asked by Kessemeier to be chaplain of the party. Naturally he had accepted, his personal expenses being paid by the Company. In 1937, when Molzahn went to Europe with his wife, he bought his ticket through Kessemeier. There was nothing wrong in this, it was only the natural way for him to go to Germany, and on this occasion he had paid his own expenses and those of his wife. The friendship with Kessemeier had however cooled, and there was a reason for the cooling. Kessemeier had a daughter married to a half-Jew in Germany, and Molzahn had befriended the young couple, although Kessemeier had opposed the marriage of his daughter. Molzahn had hunted up the son-in-law in Germany and actually helped him to the extent of giving him a small sum of money. Later, \$50 was returned to him by Kessemeier, and the Government made much point of this as showing that the relations between Molzahn and Kessemeier must at the time have been friendly, but it was plain from Molzahn's testimony and that of his wife that his relations with Kessemeier had distinctly cooled, and according to Mrs. Molzahn it was Kessemeier's Naziism that had caused the cooling. Surely under these circumstances, to hold up Molzahn's intercourse with Kessemeier as a reason for thinking that he would have gone into the conspiracy was hardly a fair inference.

Molzahn gave an entirely different account of his interview with Pelypenko (see pp. 442-446). His sexton had told him that the priest had called and tried to see him while he was away. The priest called again, and the sexton brought him in. Molzahn "was polite to him and

very friendly." He offered him a seat on the other side of the table at which he was sitting. He was surprised that a priest in clerical garb should come to see him. Pelypenko spoke in broken German, and as the conversation progressed Molzahn could not get it clear what the man wanted, although he did speak about the Ukraine and Russia and Poland. Molzahn asked him why, if he needed help, he did not go to his own church. The man gave him no clear answer. He had with him quite a bundle of papers which he took out of his cassock, and he showed Molzahn an envelope, and mentioned the name "Kunze" whom Molzahn knew to be active in the Bund. He did not say anything about Kunze, but when Molzahn heard the name Kunze, that was enough for him. The man held out an envelope in front of him, and Molzahn saw on the back of the envelope his address. He tore the flap off the envelope and told the priest "in all friendliness and determination, to tell Mr. Kunze if he had a chance not to use" his "return address any more" (p. 444). He tore off the flap and handed the envelope back to the priest without reading the letter. Molzahn remembered the incident, naturally enough, and later spoke of it to others. Kunze's father was organist at another Lutheran church in Philadelphia, and as Mr. Schlick, the pastor of the church, was known to Molzahn, Molzahn spoke to him in regard to the matter and asked him to speak to the elder Kunze. Pastor Schlick said that it made the old man sick to refer to his son, he was so utterly opposed to his son's activities. Later, Molzahn spoke to Kunze Sr. about the matter, and then the thing was dropped. Molzahn saw a large number of persons who came to his sacristy from day to day, and having no special reason to remember the incident until examined before the Grand Jury in May, 1942, it is not surprising that the details went out of his memory. He could not remember more than one interview with the priest, although we examined him closely on the subject, and his

only recollection of the interview was as he stated on the stand. It was a flat denial of the priest's testimony.

Towards the end of the evidence for the defense a request was made by counsel to interview Kunze, Willumeit and Ebell, who having pleaded guilty were in the custody of the Government. We asked the Special Assistant Attorney General for leave to question them, but the request was refused, and an order of court was applied for. The Court considered the matter over night, and on the following day decided that counsel for the defense might examine the men, the examination being made behind closed doors, with only the men themselves and their counsel and the court stenographer being present to take down what they said in answer to the questions asked them by counsel.

It was an interesting moment when Kunze was examined. Would he say that Molzahn knew about the conspiracy, and what would he say about the letter he had written to Molzahn?

He answered the questions asked him by counsel at the meeting allowed by the court. And then there was even a more interesting moment—what promised to be a turning-point in the case—when later Kunze and Ebell were produced in court, in obedience to the judge's order, and in a crowded courtroom gave their testimony, being first examined by counsel for the defense and later cross examined by the Special Assistant Attorney General. Asked about Molzahn's alleged part in the conspiracy, their testimony, if taken to be true, completely exonerated him (pp. 555 to 566, 602 to 605, and 607 to 614). Kunze was directly asked as to the letter which he wrote Molzahn, and he testified that it was merely one of introduction, paving the way for Pelypenko to visit Molzahn but saying nothing about the conspiracy. So then, if Kunze was to be believed, it was immaterial whether or not Molzahn had received the letter. Pelypenko had not informed him

of the conspiracy, and if Kunze's letter had not done so, the bottom dropped out of the Government's case. Kunze was fiercely cross examined by the Government's attorney in the effort to show that he had made a different statement to representatives of the Government, but Kunze stood his ground and would not hedge, although in testifying as he had done he ran the risk of angering the Government. Both he and Ebell had not yet been sentenced, and it was a fair assumption that what they said, if it did not make out a case against Molzahn would not be to the satisfaction of the Government.†

POINT II.

As the Verdict of the Jury was Based Upon the Action of an Informer Employed by the Government in an Effort to Secure the Commission of Crime by an Otherwise Law-Abiding Citizen, the Judgment of the District Court in Sentencing the Defendant was Contrary to Public Policy and Should have been Reversed by the Court of Appeals.

At the time of the trial there was considerable discussion relative to entrapment, the matter first coming up when the defendant objected to Willumiet's testifying to what Kunze said to Father Pelypenko at the meeting on July 26, 1941. The question was then raised as to whether a Government agent who himself takes part in a conspiracy can testify as to statements made by the conspirators. The Record has it (p. 92) that counsel argued that there was evidence that Pelypenko, as Government agent, brought Kunze into the conspiracy. If counsel did say "Kunze" instead of Molzahn, it was a slip of the tongue, because there was not the slightest evidence that Kunze was brought into the conspiracy by Pelypenko. Counsel's argument was that Molzahn was brought into the conspiracy by Pelypenko, and this was what counsel intended to say, counsel arguing that as it

* Through Kunze we were also able at the close of the case to put in evidence the postscript note at the bottom of the "Ferdinand and Wolf" letter, which the government had not put in evidence with the letter. It showed that the "Kurt" of the letter was not Molzahn, but a certain Kurt Tuermer of Mexico City. See pp. 604 and 605 of the Record.

was an informer and not a co-conspirator who had taken part in the meeting, the rule that the statement of one conspirator is binding on the others in a conspiracy did not apply to the case, and the testimony should not be admitted. And in addition to the fact that the conspiracy was not otherwise proved, we argued that the principle of entrapment should be invoked, because the Government was basing its case on evidence which showed that Molzahn was brought into the conspiracy through Pelypenko. Counsel for the defense contended that at the time of the conversation Molzahn was an innocent man, not engaged in anything illegal. According to Pelypenko, the Government agent, he had visited Molzahn in May after getting the latter's name from the German Consul in Philadelphia, so that it was a fair inference that it was Pelypenko and not Molzahn who took the initiative. Pelypenko's visit as a Government agent to Molzahn was not to disclose criminal conduct already perpetrated by Molzahn, but rather to lead him into such conduct and entrap him (page 93).

At the close of the case, Mr. Coleman, of counsel for the defense, specifically referred to the argument that had been made in the course of the proceedings as respects entrapment. He did this in moving for a directed verdict of acquittal. He used the following language (pp. 662-663):

"Your Honor, at this time at the close of all the evidence we ask that a verdict be directed for the defendant on all the evidence. Specifically we refer, your Honor, to the argument made at an earlier stage in the proceedings by Mr. Kane on the entrapment phase as seeming to us to raise a question of law which would require a directed verdict on all the evidence.

"We further make a claim that no proof by competent evidence of a conspiracy as alleged in the indictment and amplified by the bill of particulars

has been made out, and for that additional reason we request your Honor to direct a verdict at this time for the defendant.

“THE COURT:—The motion is denied. Exception may be noted.”

The argument was that the priest Pelypenko was a Government informer; that his visits to Molzahn at the time he said he left the photostats were directed to inducing Molzahn to assist Kunze in the carrying on of the conspiracy; and that the priest's return later in order to secure an interview with the defendant was for no other purpose than that of trapping him into the conspiracy. We were certainly correct in this interpretation of the priest's activities. Whether or not the evidence showed an actual entrapment, it showed an attempt to entrap by an employee of the Government. The Government agents sought to hook Molzahn into a conspiracy with which, so far as the evidence discloses, he had had nothing to do (pp. 93, 94).

Throughout the trial and until the case went to the jury, counsel for the defense argued that there was no evidence that Molzahn had really done anything to make him guilty as a conspirator, but the case was submitted to the jury and they found him guilty. They could have based their verdict only on the theory that Molzahn had done something to make him guilty. An attempt to entrap had been proved.

Pelypenko acted as an *agent provocateur*—he was no mere informer. He had cooperated with Kunze in seeking to bring about the commission of crime by an otherwise innocent man, and this should have been reason enough for the judge to refuse to submit the case to the jury. The court should have ruled that under the evidence disclosed it could not allow its process to be used to convict and punish an innocent man.

We are not unmindful of Pelypenko's interview with

Molzahn in May, when he talked with him about the "aid of the Ukrainians in the German aims," and Molzahn, according to Pelypenko, said that the aid might be directed in part to "giving information "about factories and military equipment." But these isolated words contained no substantial evidence that Molzahn was violating the law, and to argue from them that he had in mind a subsequent violation of the law was to hang the case upon a very slender thread. Therefore we cannot agree with Judge Hand, who says in his opinion that the fact that in May Molzahn advised Pelypenko to help German aims by giving information about factories and military equipment shows a direct interest in German espionage activities (see Opinion, p. 699). Even if the words did show a direct interest in German espionage activities in May 1941, it was a far cry to September, when the priest said he had his second interview with the defendant. There was, we repeat, no substantial evidence that Molzahn was breaking the law in the previous meeting. He was then an innocent man—entirely innocent of the charge subsequently brought against him. The conspiracy was not actually formed until July 26, 1941, and it was then that Pelypenko, true *agent provocateur* as he was, entered into the arrangement with Kunze to bring Molzahn into the conspiracy. Pelypenko's testimony, as well as that of Willumeit, was to the effect that the idea of bringing Molzahn into the game arose with Kunze, and perhaps this was true, although it is hardly likely that Kunze hit upon the idea of bringing Molzahn in when there were other Lutheran ministers in Philadelphia and elsewhere, who might as well have been asked to help him. It is far more likely that Pelypenko, who had seen Molzahn in May, suggested him. But whether he did or not, whether he thought of bringing Molzahn in arose in Pelypenko's fertile mind, or in the mind of Kunze, it matters not as respects the law of entrapment, for Pelypenko in every sense cooperated with Kunze to bring in the

pastor. The photographs were sent to Pelypenko in New York, not to Molzahn, and, if he was to be believed, he took them to Philadelphia for Molzahn to use. Twice he went to Philadelphia with the photographs, and according to his testimony left a part of them for Molzahn at his office. Finally, on his third visit to Philadelphia, he claims that he saw Molzahn, and this was of course to get him to make admissions that the Government might afterwards use against him.

We have the greatest respect for Judge Hand—he indeed stands high on the list of distinguished Federal judges—but he does not seem to realize the iniquity of the thing. Pelypenko, an employee of the Department of Justice, was reporting, as we have said, to Fellner, the agent of the Department who had met him on the wharf when he arrived from Buenos Aires. But whether or not he was being followed up by a representative of the Department, the Government was responsible for what he did. If he went over the line of what was right and proper and provoked the commission of a crime, the Government agents cannot later excuse themselves by saying that they did not know what he was doing.

The attorney for the Government, whoever it was who was overlooking the work of the agent Fellner, should have frankly told the agent that it was going too far to allow the priest to go to Philadelphia and attempt to entrap the pastor. Or, if the F.B.I. man had already directed Pelypenko to cooperate with Kunze, the work of the informer should have been thrown to one side and no prosecution of the pastor instituted. The F.B.I. man should have been told that the others would be prosecuted and that that should be enough.

Judge Hand notes the fact that Kunze paid Pelypenko \$50.00 upon the promise that the latter would aid him in getting a passport (see pages 694-695 of the Opinion as printed in the Appendix to this brief). Judge Hand has no adverse comment to make on this swindling of Kunze by Pelypenko. Surely Pelypenko's act in taking the

money deserved further comment from the Court. The money was certainly paid Pelypenko, for Willumeit testified that he saw the money pass from Kunze to Pelypenko in a \$50.00 note (pp. 622-623), and Judge Hand treats it as a proven fact. There was no contradiction of the testimony, and whether Pelypenko ever told the agents he had received the money does not appear. A making of money on the side by an informer may occasionally happen in cases where under-cover men are employed, but it is certainly unusual for an *agent provocateur* to get money from his dupe for the forwarding of a conspiracy. The fact that in this case the man so made money on the side shows how far the ordinary rules of honest dealing may be stretched if the courts are to allow such testimony to be used in this way in aid of criminal prosecutions.

THE FACTS AND THE LAW AS STATED IN *SORRELLS v. UNITED STATES*, 287 U. S. 435 (77 L. Ed. 413).

The Court will remember the facts in *Sorrells v. United States*, 287 U. S. 435 (77 L. Ed. 413). It was a liquor case, the prosecution having been brought to punish a violation of the Volstead Act. The revenue agent had gone to the town where Sorrells lived, and by securing an introduction to him had spent a social evening with him at his house, and then lured him into selling him a bottle of liquor, the man not knowing that his caller was a revenue agent, but supposing him to be only a friendly visitor. Sorrells had had the reputation of being a rum runner, but there was no evidence that he had in his possession any liquor at the time, or that he was at the time a seller. He had even to send out to get the bottle of liquor which he sold the agent, although it was a fair inference that he knew where he might procure it. There was a conviction and sentence, and an appeal to the Court of Appeals for the Sixth Circuit. The latter court affirmed the sentence, but the Supreme Court granted a certiorari, and the case was fully argued by counsel for the appellant and the Government. The Supreme Court reversed the de-

cision of the Court of Appeals sustaining the sentence, Chief Justice Hughes writing the opinion of the Court and basing his conclusion on the theory that to justify the prosecution of a man under such circumstances would be to write something immoral into the Prohibition Law which Congress could not have intended. The Supreme Court, in accordance with the opinion expressed by the Chief Justice, reversed the judgment of the court below and sent the case back to the trial court for further proceedings. Mr. Justice McReynolds alone dissented. Mr. Justice Roberts wrote a separate opinion in which Mr. Justice Brandeis and the present Chief Justice concurred. He believed with Chief Justice Hughes that the judgment should be reversed but for a different reason. He held that "where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. Equally true is this whether the offense is one of common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require." Consequently, he and the two Justices who joined with him in his opinion agreed that the judgment should be reversed, but were of the opinion that the cause should be remanded to the district court with instructions to quash the indictment and discharge the defendant.

We have searched the more recent reports but cannot find that the conclusions reached in the Sorrells case have been in any way affected by subsequent decisions. The only reference that we have found to the case is in the dissenting opinion of Mr. Justice Murphy in *Goldstein v.*

U. S., 316 U. S. 114-129 (1942), but this case arose under the Federal Communications Act and Mr. Justice Roberts in stating the Court's opinion based his conclusions solely on the wording of the statute under discussion.

It is difficult to see why the decision in the Sorrells case should not be followed in the present case. There was the same intent to instigate the commission of a crime, and to instigate it by trickery. The Sorrells case was a prosecution under the Prohibition Act and the present proceeding is a prosecution for conspiracy to violate an act relating to our national defense, but the rules of criminal law and ethics apply equally to both prosecutions. One cannot logically condemn trickery in one case and uphold it in another. If the Court is to accept the reasoning of Chief Justice Hughes or the reasoning of Mr. Justice Roberts in the earlier case, the sentence should be reversed in the present proceeding. The only possible question is as to the facts. Do the facts in the present case fairly bring it within the scope of the earlier decision? We submit that they do.

As respects the question of whether the defendant was a law-abiding man when Pelypenko went to him, the facts are even stronger than they were in the Sorrells case when the prohibition agent went to Sorrells in order to entrap him. Molzahn was then a law-abiding man, unless the words attributed to him according to Pelypenko's testimony at the interview in May show that he was then and there violating the law under which he was indicted. In the Sorrells case there was the fact that the man had the reputation of being a rum seller. Molzahn had no reputation of being a Nazi sympathizer, let alone a traitor to his adopted country. There was a "luring" in one case and only a trap set in the other, into which, if the jury's verdict was right, Molzahn stepped, and so was guilty of entering into the conspiracy. The absence of "luring" in the present case made it only weaker from the standpoint of the Government. In the Sorrells case

the man had at least violated the letter of the law in selling the liquor. Molzahn had in no way violated the provisions of the Code. In each case the Government agent, to use the slang of the day, "went out to get" the man, and the act was as reprehensible in the one case as in the other. Consequently we contend that the judgment of the District Court in the present case in sentencing the defendant was contrary to public policy and should have been reversed by the Court of Appeals.

At the conclusion of all the evidence in the present case evidence for the Government in chief, the evidence for the defense and the evidence in rebuttal—the defendant's counsel moved for a directed verdict of not guilty (see pp. 662, 663). What was said by counsel at the time will be quoted later in the present brief. The Court was asked to allow an exception, and an exception was granted. The refusal of this motion is the subject of Assignment of Error No. 7.

The judge in his charge (pp. 664-666) failed properly to analyze the evidence. He did not call the attention of the jury to Kunze's testimony as respects the contents of his letter to Molzahn. This testimony was of prime importance for even if Molzahn had received the letter it would have told him nothing of the conspiracy. Surely this should have been pointed out. True, the jury might not have believed Kunze, but then there was an empty space—a vacuum—to be filled, and it had not been filled by Pelypenko's testimony. He had not told Molzahn of the conspiracy. There was no question as to the soundness of what the judge said to the jury, but it was inadequate under the circumstances. The trial had lasted four weeks, and the testimony on which the Government's case depended was not analyzed. The attention of the jury was not called to Kunze's testimony regarding the letter he had sent by mail to Molzahn. Even if Molzahn had received it, it would have told him nothing of the conspiracy. Surely

the Judge should have pointed this out. True, it was still a question for them, for they might not have believed Kunze, but then there was an empty space, a vacuum, to be filled, and it had not been filled by Pelypenko's testimony. He had not told Molzahn of the conspiracy.

The jury retired after the Judge completed his charge. This was at 3 P. M. on Friday, August 21st. At 4 P. M. they returned to the courtroom for further instructions by the Court, and at 5 P. M. they returned a verdict of guilty, having been out something less than three hours. Motions to enlarge the defendant and to set aside the verdict and grant a new trial were made by counsel. The first motion was refused, and the defendant was remanded to the custody of the Marshal. The Court set the following Tuesday, August 25th, for disposing of the new trial motion. After argument then made by counsel for the defense and the Government, the Court decided the matter, refusing the motion to set aside. The Court stated its opinion orally, as follows (pp. 678, 679):

"Tuesday, August 25, 1942, Afternoon Session.

THE COURT:—On the motion to set aside the verdict and for a new trial:

The defendant in argument uses the analogy of a chain of evidence in which some of the links are missing. The links, consisting of evidence sufficient to go to the jury, have been produced in this case. The strength of the links is a matter for the jury to determine.

The testimony of Pelypenko that the photographs of Kunze, taken with a purpose of obtaining travel documents, were left by him on two separate occasions at defendant's office, that later defendant told him that a letter from Kunze had been received and that defendant had done what he could, that defendant told Pelypenko defendant knew Kunze was going out of the country carrying important documents

would, if believed, supply the link which defendant apparently claims is missing.

The weight of evidence produced by the Government as well as that produced by the defendant including the character evidence was for the jury to determine. The jury has had an opportunity to observe the witnesses on the stand under direct and cross examination and to assess their credibility.

The motion to set aside the verdict and for a new trial is denied.

THE COURT:—Exception may be noted.”

The refusal to grant the motion to set aside and for a new trial forms the subject of Assignment of Error No. 8. The case was one, we contend, in which the Judge should have exercised his discretion and granted a new trial.

POINT III.

The Defendant did not have a Fair Trial.

We have already alluded to the way in which the mind of the jury was poisoned during the trial by the introduction by the Government, in a garbled form, of the two letters written by Kunze and sent by him by mail from Mexico on December 8, 1941. We contended that the evil effect of this evidence was not corrected by anything which was said by the representatives of the Government or by the Judge. The speeches of counsel were not included in the record as it went to the Court of Appeals and we deemed it material that the Court of Appeals should see just what was said or left unsaid by counsel. We therefore in our Petition for a Rehearing requested the Court to allow us to add to the record what was said by counsel in their summing up speeches in reference to the exclusion of the postscript letter (Exhibit R), when it was introduced by the defense. We stated that we had in our possession the speeches in typewritten form as reported

by the stenographer and that we believed that they would demonstrate that the Government to the end of the trial used the "Ferdinand and Wolf" letter to show that Molzahn was guilty.

The Court of Appeals in denying our motion for a rehearing incidentally denied our request that the speeches be attached to the record.

From the first Molzahn was treated by the Government as a public enemy too dangerous to be accorded the rights of an American citizen. This was shown in the summoning of him to appear before the Grand Jury in Hartford before the indictment was found, and the fixing of security for his appearance at \$25,000—a preposterously high figure considering he was a well known and highly respected minister living at home with his wife and family in Philadelphia. What chance there was of his running away it would have been hard to imagine, but he was forced, as he states in his petition, to an imprisonment of four days before the money was raised in cash by his friends and deposited with the Commissioner. Previously, and when he was still without counsel, the search of his house and the seizure of the exhibits used against him had taken place, and from that time on the things seized remained in the possession of the F.B.I. It is true that he had consented to the search and made no objection to the seizure of the books, photographs, and other articles that were taken out of his possession, but he was injured none the less by what was done. With the things taken from Molzahn's house were numerous other exhibits that had been taken from Vonsiatsky's residence in Connecticut and which did not involve Molzahn at all.

It is hard to give a picture of the court room with its crowd of interested spectators as the trial progressed from day to day, but the atmosphere was tense with war excitement. With hardly an exception the witnesses for the defense were assailed by the Government as if they had done something wrong in coming to Hartford. Every

opportunity was taken to prejudice the jury against them. Again and again the German birth of a witness or his descent from German ancestors—his natural love for the land of his birth or that of his forefathers—was held up before the jury as a reason for discrediting him. If the witness had been born in Germany and for some reason or other had not applied for citizenship promptly, his loyalty to the land of his adoption was questioned. If the man or woman had visited Germany, it was a reason for believing that the witness was in sympathy with the Nazi party and the Fuehrer. It mattered not that the witness had relations in Germany—parents, brothers and sisters—whom he wished to see. Or, if he had wished to inform himself as to developments in Germany, it was taken as a reason for assuming that he had an admiration for the Nazi government. And if by any chance, after the man's return to the United States, he had spoken of things to be commended in the German government, it was full proof that he was in sympathy with it. All this took place while the trial was progressing, and it must have prejudiced the jury's mind.

After a trial that had lasted for over three weeks and during which over fifty witnesses had been examined, the case was laid before the jury and they brought in a verdict in less than three hours' time. The charge of the judge covers twelve printed pages, and they could hardly have had time to consider his instructions. The evidence being what it was, it is impossible to see how the jury could have obeyed the Judge's directions to consider the testimony of both sides carefully, and bear in mind that the law presumes every man innocent until proved guilty, and that the proof in criminal cases must be beyond reasonable doubt.

A few months before the trial a startling revelation of what had been attempted by Germans and German-Americans in our midst to injure the United States—to make war on it secretly—had been published in the news-

papers. The F.B.I. had prosecuted ten men in New York under the same provisions of the Code that were invoked in the present case. The defendants had been convicted, and the story of the case, under the heading "The Case of the Ten Nazi Spies" had been written up by a man who sat upon the jury. This article had appeared in Harper's Monthly for the month of June. And more recently, there had been the dramatic arrest of saboteurs on the beaches of our Atlantic Coast—the men who had been brought across the Atlantic in German submarines and who had landed on our shores, fully equipped to do untold damage to our munitions plants, killing hundreds and perhaps thousands of our citizens. There was indeed a case of German espionage, proved beyond the possibility of a doubt, and carrying with it most serious implications. With such cases fresh in their minds, it was natural that the men and women on the jury would act with prejudice against a man of German birth. That they did this is clear from the verdict that was rendered.

CONCLUSION.

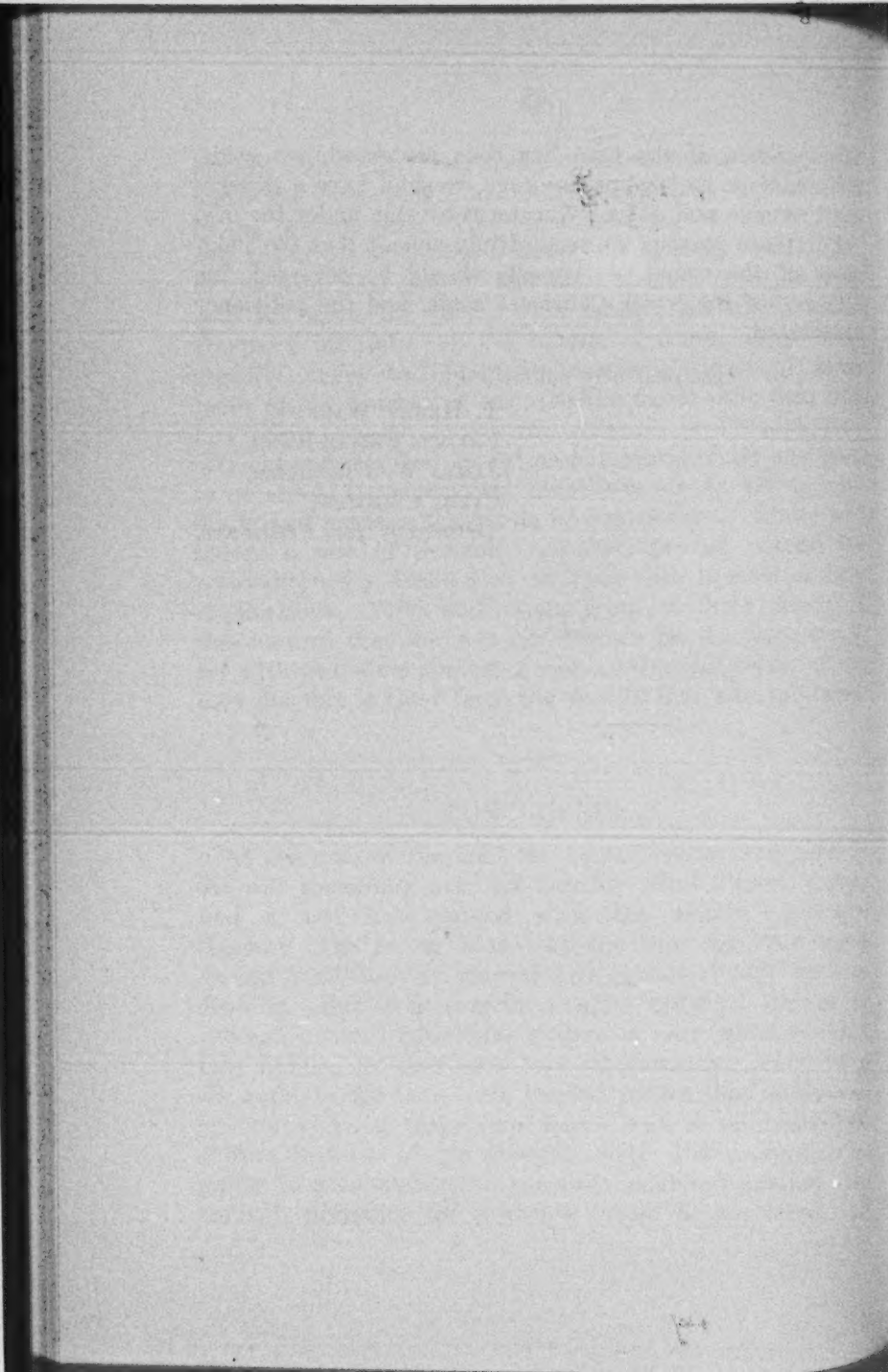
At the time of the trial the United States had been in the war something over six months. Now almost a year and a half has elapsed since the attack on Pearl Harbor. The fervor caused by the war—the war spirit during hostilities—is natural and cannot rightly be condemned. But it is something quite different for us to proceed against individual citizens in our midst because they happen to have been born in Germany. They have the right to the same even handed justice that is allowed to others living under our flag. And if an individual suffers because of his German birth and a verdict of guilty in a criminal case has been rendered against him through prejudice the injustice should be corrected and

the sentence, if the man has been sentenced, set aside. Otherwise in judicial proceedings we shall have a government by men and not a government by men under the law.

For these reasons we respectfully submit that the judgment of the Court of Appeals should be reversed, the sentence of the lower Court set aside, and the petitioner discharged.

Respectfully submitted,

T. HENRY WALNUT,
FRANCIS FISHER KANE,
JAMES W. CARPENTER,
CYRIL COLEMAN,
Attorneys for Petitioner.



APPENDIX.**ASSIGNMENTS OF ERROR.***Assignment of Error No. 1.*

The court erred in denying defendant's motion for a directed verdict at the close of the government's case because the evidence of the government failed to support the charges in the indictment against the defendant Molzahn.

Defendant's exception to the court's action will be found on page 149 of the Bill of Exceptions.

The only testimony in the government's case which created even a suspicion that Molzahn knew of and participated in the conspiracy is found in the recital by Pelypenko, an informer employed by the government, of an interview which he stated he had with Molzahn. This testimony (which appears on pages 17, 18 and 19) failed to establish knowledge of or participation in the conspiracy on the part of Molzahn.

Assignment of Error No. 2.

The court erred in permitting the witness Pelypenko to testify to the alleged conversations which he said he had had with three of the self-confessed conspirators—Kunze, Vonsiatsky and Willumeit—at the Bismarck Hotel in Chicago on July 26, 1941, because the conversations were hearsay as to the defendant, since there was no proof that up to the date mentioned Kunze, Vonsiatsky and Willumeit had formed or were engaged in the conspiracy, or that the defendant Molzahn knew of it and was participating therein.

Defendant excepted to the court's ruling (pp. 11-12).

The alleged conversations testified to by Pelypenko are to be found on pages 12, 13, 22 and 23.

Assignment of Error No. 3.

The court erred in admitting Exhibit 25, consisting of four written documents alleged to be credentials of Pelypenko as a Roman Catholic priest, because the documents were not properly authenticated, and were inadmissible as hearsay and likewise hearsay superimposed on hearsay. Defendant's counsel had no opportunity of cross examining the persons whose names were given as Pelypenko's sponsors. He was not entitled to the benefit of the alleged credentials.

Defendant objected to the court's action and exception was duly taken (p. 51).

The papers were described and read into the evidence (pp. 45-53 and 656-660).

Assignment of Error No. 4.

The court erred in permitting Willumeit to testify as to what Kunze said to Pelypenko concerning the defendant Molzahn at the Bismarck Hotel in Chicago on July 26, 1941, because the same was hearsay as to the defendant, since there was no proof that up to the time that Kunze was alleged to have made the statement Willumeit, Vonsiatsky and himself had formed or were engaged in the alleged conspiracy, or that the defendant knew of it or was participating therein.

Defendant objected to the court's action and exception was duly taken (p. 94).

The testimony objected to was as follows:

"Q. What did Kunze say to Father Pelypenko about the defendant Molzahn at this meeting?

Q. Will you answer that question, doctor? A. Mr. Kunze told Father Pelypenko that he was going to forward the passport pictures either to him or to Pastor Molzahn, that he was going to write to Pastor Molzahn that he wanted Pelypenko to meet Pastor Molzahn personally, and that Paston Molzahn would take care of everything" (p. 95).

Assignment of Error No. 5.

The court erred in admitting the alleged conversations which the witness Flatter said he had had with Molzahn on a trip to Europe in July, 1937, because the conversations, which are alleged to have been had, occurred about four years prior to the period of the conspiracy alleged in the indictment.

Defendant objected to the evidence and excepted to the court's ruling (p. 62), and the conversations appear on pages 63-73.

Assignment of Error No. 6.

The court erred in admitting Exhibits 34 and 35, because they were two letters alleged to have been written by Kunze subsequent to the period of the conspiracy.

Defendant objected to the admission of the letters (p. 145) and translations of them will be found on pages 146 and 147.

These exhibits were particularly and unduly prejudicial to defendant, because the body of the second letter contained a reference to "Kurt" and a postscript (p. 506) to the second letter in handwriting entirely different from Kunze's and signed "Kurt" seemed to refer to the defendant Kurt Molzahn, until the defense proved that the Kurt referred to was Kurt Tuermer of Mexico City, of all of which the government was well aware at all times.

Assignment of Error. No. 7.

The court erred in denying the motion of the defendant Molzahn at the conclusion of the trial for a directed verdict of not guilty, because the evidence did not support the indictment.

Defendant excepted to the court's action (p. 662).

The evidence offered in behalf of the defendant did not supply the lack of evidence in the government's case. Nothing was added that in any way proved Molzahn's

knowledge of and participation in the conspiracy. This was true also of the testimony in rebuttal and sur-rebuttal. In the course of the evidence for the defense, the defendant himself took the stand and denied the truth of the charges against him. A large number of witnesses also testified in his behalf, among whom were included three of the self-confessed conspirators named in the indictment, who, while awaiting sentence, by their testimony exonerated defendant.

Assignment of Error No. 8.

The court erred in denying the defendant's motion to set aside the verdict and grant a new trial, because the evidence did not support the indictment.

Defendant excepted to the court's action (pp. 667-669).

The judge should have set aside the verdict, it being clear that the jury had reached their conclusion by yielding to the war fervor that existed throughout the trial, rather than by a due consideration of the evidence.

WHEEFORE the defendant prays that the judgment of the District Court be reversed and that the defendant be found not guilty under the indictment.

Dated at Hartford this 27th day of November, 1942.

KURT EMIL BRUNO MOLZAHN,
Defendant,

By

FRANCIS FISHER KANE,
JAMES W. CARPENTER,
CYRIL COLEMAN,
His Attorneys.

Service of the within is hereby admitted this 27th day of November, 1942.

Attorneys for Plaintiff.



UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

United States of America,
Appellee,

against

Anastase A. Vonsiatsky,
Gerhard Wilhelm Kunze,
Wolfgang Ebell,
Otto Willumeit,

Defendants,

and

Kurt Emil Bruno Molzahn,
Defendant-Appellant.

OPINION OF THE COURT OF APPEALS.

(Filed April 2, 1943)

Before SWAN, HAND and CLARK, *Circuit Judges.*

AUGUSTUS N. HAND, *Circuit Judge:*

The defendant Molzahn was convicted in the United States District Court for the District of Connecticut of conspiring unlawfully to disclose information affecting national defense in violation of Section 2 (a) and 4 of the Espionage Act of June 15, 1917, c. 30, Title 1, 40 Stat. 217 (50 U. S. C. Sections 32 and 34). The portions of the Act which are applicable are quoted in the margin.¹

¹ Sec. 32. *Unlawfully disclosing information affecting national defense.* Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appli-

The indictment charged that continuously from January 1, 1941, to "on or about the sixth day of December 1941" the defendant Molzahn and the defendants Vonsiatsky, Kunze, Ebell and Willumeit conspired with one another and with divers other persons to the grand jurors unknown to communicate and transmit to the foreign governments of Germany and Japan and the representatives of those governments, documents, writings, plans, notes and information relating to the national defense of the United States and particularly to transmit information as to the numbers, personnel, disposition, equipment, arms and morale of its army, navy and air force, with intent and reason to believe that the information would be used to the injury of the United States and to the benefit of Germany and Japan.

All the defendants, other than Molzahn, pleaded guilty and were sentenced—Vonsiatsky and Willumeit for five years, Ebell for ten years, and Kunze for fifteen years. Molzahn was found guilty by the jury after a four weeks trial and was sentenced for ten years. He has appealed on the ground that the evidence was insufficient to show his participation in the conspiracy, that there were errors on the part of the trial judge in the admission of evidence and that he was not afforded a fair trial. In our opinion the evidence against him was substantial and justified the jury in rendering its verdict and he had a fair trial.

ance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years:

(The rest of the Section applies to offenses committed in time of war.)

Sec. 34. *Conspiracy to violate preceding sections.* If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of Title 18. * * *

To obtain a proper understanding of the evidence relied on by the government it is necessary to give a brief outline of the activities of the defendants, other than Molzahn, who beyond any question were shown to have been engaged in a conspiracy to accumulate and furnish to Germany and Japan information relating to the military resources of the United States.

Vonsiatsky was the leader of the Russian National Revolutionary Party, the object of which was to help the Russian people to change the Bolshevik Government. Kunze was born in the United States but had become a subject of the German Reich in the autumn of 1941 just before the attack of the Japanese on Pearl Harbor and was an active member of the Bund. Ebell was a physician who had been born in Alsace, lived at El Paso, Texas, where he practiced medicine, and had become an American citizen. He, too, was a member of the Bund and an associate of Kunze. Willumeit was a Chicago restaurateur and likewise a member of the Bund. He had received a German education and was a graduate in medicine from the University of Bonn. The appellant Molzahn was the pastor of Old Zion Lutheran Church in Philadelphia. He was born in Germany and educated there. He served in the German Cavalry on the Russian front in the last war. In 1924 he received a call to a pastorate from a Lutheran Church in Johnstown, Pennsylvania, where he worked until May, 1929. He is a man of evident ability who has become well known in Philadelphia. His church there was a very old one; he increased the congregation, acquired many friends and gained a decided reputation as a preacher and public speaker. It may be hard to suppose that zeal for the Fatherland, or the influence of wrongheaded associates, sometimes so overpowering, would have led a man of Molzahn's excellent abilities and high calling to participate in a conspiracy against the

country of his adoption. But an outline of the evidence which persuaded the jury that he was a participant seems to justify its verdict.

A government witness named Flatter testified that he was a fellow passenger of Molzahn on the Europa, sailing for Bremen in July, 1937. He said that Molzahn wore a Nazi emblem on the steamer and told him that he ought to join the Nazi party. Flatter had lost his position in Germany because of speeches against Hitler and membership in the Socialist Party of Dr. Stressmann. Molzahn offered to assist him in re-establishing himself and gave him a card to G. Behrensmann, a brother-in-law of Mrs. Molzahn and a legal adviser to the Gestapo, in order that the latter might aid him. Molzahn also told Flatter that he was going to Berlin to have conferences with "higher-ups." There was proof that Molzahn was very friendly with a pronounced Nazi in Philadelphia named Kessemeier, though Bishop Pfatteicher, the head of the Lutheran Synod in 1938, cautioned him to avoid the intimacy. Moreover in 1939 Molzahn discussed with Pfatteicher the question of his naturalization and of his loyalty to the United States and on that occasion said that he found it rather difficult to have any supreme loyalty "having been a German so long and having relatives of his wife in England, and also having this home of his with his kiddies in America." To the foregoing may be added the fact that Molzahn seems to have been known among Bund members as friendly to them and when his premises were searched photographs of Hitler and Goebbels, a Nazi pennant, as well as various documents of the German propaganda agencies were found in a closet in the house. In an address in 1934 he made statements in which he commended the Hitler regime and in the year 1937 held a service in his church in memory of Germans who lost their lives in the last war at which representatives of the Bund were present in uniform and presented a wreath to be laid on the altar of the church.

Toward the end of March, 1941, Pelypenko, a Roman Catholic priest of the Ukrainian Rite, came to this country from Buenos Aires and entered the service of the Federal Bureau of Investigation. He was sent to the United States by the American Embassy in The Argentine. While in The Argentine he had furnished secret information to the British Intelligence and the American Embassy. In April, 1941, he met Willumeit in a Ukrainian restaurant in Chicago. Apparently about the same time he called on the German Consul in Philadelphia and said that he desired to become acquainted with people who were aiding the German propaganda. The Consul told him that Molzahn was "one of our most important co-workers," was "one of the closest co-workers of the German Consulate," and gave him a card on which was the name and Philadelphia address of Molzahn. About the middle of May, 1941, Pelypenko called on Molzahn and asked to be connected "with the German Embassy in Washington." Molzahn said that he knew Baron von Geinanth of the Embassy but would ask to have the introduction made by "another co-worker Pastor Evers in Baltimore" and said: "Pastor Evers is working with the Embassy just as well as Pastor Molzahn." Pelypenko then asked Molzahn what he thought about "the aid of the Ukrainians in the German aims" and the latter replied:

"* * * Ukrainian aid may be directed in three directions. * * * First direction: propaganda against war and against the warring authorities in Washington. Secondly: to lead propaganda mongst Ukrainians concerning independence of the Ukraine. Thirdly: to give information about factories and military equipment."

The day after the visit to Molzahn in May Pelypenko called on Pastor Evers in Baltimore, told him that he had come from The Argentine, financed by the German govern-

ment, in order to work among the Ukrainians of America and asked whether Evers could not establish contact for him with the German Embassy. Evers gave him the address of the German Consulate in Baltimore but refused to do more. Pelypenko went to the Consul there who called up the Embassy in Washington. Pelypenko went to Washington and had a conversation, at which Molzahn was discussed, with von Haydn, the Secretary of the Embassy, at the Hotel Harrington.

In June or early July, 1941, Pelypenko met Kunze at the office of the Bund in New York, having been given an introduction through a letter from Willumeit. About July 26, 1941, Pelypenko met Kunze, Vonsiatsky and Willumeit at the Hotel Bismarck in Chicago. He testified that between the first of April and some time in August he spent three-fourths of his time in that city. During the meeting at the Bismarck Vonsiatsky stated that he had accumulated information concerning the location of the American army, fleet and aviation force for a Japanese agent, who was expected to arrive on the Tatuta Maru; also that the information would be taken by Kunze to South America, who thereafter would try to visit Berlin. Kunze said that Molzahn was his co-worker in Philadelphia, that he expected Pelypenko to help Kunze to get a document for the trip to Europe, and that he would write Molzahn and ask him to see Pelypenko and do whatever he asked. Kunze also said at the Chicago meeting that the information was about the military position of the United States and would be given him by Vonsiatsky, Willumeit and other co-workers. He added that in view of his possible trip to Europe he was afraid to go through the English blockade with an American passport and would like to have some other document—Polish or Czech or some other one that would enable him to pass through “as an ally.” At the Chicago meeting

Kunze gave Pelypenko \$50 upon the promise that the latter would aid him in getting a passport.

On July 31, 1941, Kunze sent a letter to Pelypenko at the Hotel Bristol in New York which bore on the back flap the words "K c/o Rev. Molzahn, Zion Luth. Church, Franklin Square, Phila. Pa." The envelope contained two small passport photographs of Kunze and was followed by a similar letter postmarked August 2, 1941, directed to Pelypenko at the Hotel Bristol, containing three larger photographs and having a like forwarding address to Molzahn on the back flap. These letters were received by Pelypenko at New York, who had arrived there from Chicago. There was proof indicating that Kunze in the meantime had written Molzahn about the plan for obtaining passports (Rec. p. 23) though Kunze claimed that his letter was merely one of introduction and Molzahn denied that he ever received such a communication.

After receiving the first of the two letters containing the photographs Pelypenko called to see Molzahn at his office in Philadelphia but found him on vacation and left with his assistant the two small photographs of Kunze which were mailed with the first letter to the Hotel Bristol. On receiving the second letter he again called on Molzahn found him still absent and left at the office two of the three larger photographs contained in the second letter, retaining the third himself. He returned about six weeks later and found Molzahn who said that "he received a letter from Kunze and did what he could." When Pelypenko showed him the envelope that had contained the small photographs and bore the forwarding address he said Kunze was "a good man, but * * * not careful" and "a dunce." He tore off the address on the black flap and told Pelypenko "to be careful with it." Pelypenko then asked how he could communicate with Kunze and was given a slip of paper with the address

in El Paso, Texas, of the defendant Dr. Ebell, who was a member of the Bund and afterwards helped Kunze across the Mexican border. When Pelypenko said Kunze "expects to leave," Molzahn replied: "Yes, I know." Pelypenko also said: "this business was very important, because he has with him important papers," to which Molzahn replied: "That I know."

After the first two visits to Philadelphia in August, 1941, at which Pelypenko failed to meet Molzahn he went to Thompson, Connecticut, to see Vonsiatsky who said to him that he was sending Kunze with important papers and asked Pelypenko to help and "if possible, * * * go with him across the border line, and in any case, take these papers into my own pocket." Vonsiatsky at that time gave Pelypenko a card of introduction to a General of the Japanese Army and asked him to obtain from the Japanese Embassy the name and address of the female emissary who had been expected in America and was "a very important espionage agent of the Japanese staff." Pelypenko at once went to the Japanese Embassy and was told by the attache that he did not yet know the whereabouts of the espionage agent but that it was necessary to make a contact with the military establishment in Washington and that he would like to talk to Vonsiatsky. He also said that he was interested in knowing "whether airplanes are being sent through Alaska to Russia. If so how many." Pelypenko returned to Thompson, Connecticut, reported the interview to Vonsiatsky, who gave him a card on which was written the address of a co-worker in Brazil. When asked by Pelypenko as to how he could help to get the information out of the country Vonsiatsky said, because Pelypenko was a priest, he could take things with him across the border and accordingly should accompany Kunze. Vonsiatsky had previously furnished Kunze with \$2800 to defray expenses.

Early in October, 1941, Kunze and Willumeit made an extensive tour through the northwest United States and the Pacific Coast during which Kunze obtained a knowledge of shipping facilities, coastal fortifications, points of landing, military installations and naval defenses, compared them with those of the East Coast and discussed the lend-lease in the West Indies. Their route finally extended to El Paso, Texas, where they visited Ebell who drove Kunze across the Mexican border to Juarez to see a brew master named Ferdinand Goeldner whom he was anxious to meet and later, in a letter dated December 8, 1941 (Gov. Exh. 35), asked to forward a letter to Vonsiatsky, which will be referred to hereafter. On Labor Day (1941) Kunze had been elected National Leader of the Bund, under a promise to his associates not to leave the country. While Willumeit and Kunze were at El Paso the former became suspicious that Kunze was not going to keep his promise but finally persuaded Kunze to return to Chicago. He did return with Willumeit about November 3, but after three days left for El Paso, crossed the Mexican border, finally reached the City of Mexico about November 11, 1941, and remained there until he was arrested upon the present charge and extradited to the United States. In January or February, 1942, Pelypenko visited Ebell's office at the address in El Paso which had been given him by Molzahn and was told by Ebell's assistant that Kunze was then in the City of Mexico.

On December 8, 1941, Kunze wrote Vonsiatsky from Mexico saying that he was in need of an additional \$1,000 for his expenses and asked the latter to send what he could to Ebell at El Paso. On the same date Kunze wrote another letter to Ebell enclosing the one to Vonsiatsky in which he asked Ebell to forward the first letter to Vonsiatsky. The letter to Vonsiatsky under date of December 8, 1941, dis-

closed that Kunze had given up the plan he had had of crossing the Atlantic by air. This information was supplemented by Kunze's testimony at the trial that he had a twenty-six foot boat in a Mexican fishing harbor loaded with food-stuffs in which he proposed to start on his European journey. He very likely expected to use the small boat only to reach a German submarine in the Carribean, though he swore he intended to cross the Atlantic in it.

It is true that Molzahn denied many of the facts we have recited and that the testimony of Kunze and other witnesses was inconsistent with some of them. It is also true that there were reputable witnesses from Philadelphia who testified to the high character of Molzahn and that much of his teaching and preaching would seem to be incompatible with the charge against him. Nevertheless it is reasonably clear that a substantial amount of testimony and inferences legitimately derivable from it point the other way. There was the strongest proof of a general conspiracy on the part of the other defendants to transmit military information to the enemy and to use Molzahn to facilitate their object. In view of the evidence, of his active interest in the German cause, of his statements to Flatter on the Europa, of the feeling of divided loyalty he expressed to Bishop Pfatteicher as late as 1939, and of his knowledge of just where Kunze was when Pelypenko obtained Kunze's address from him in El Paso, it is hardly surprising that the latter used Molzahn's Philadelphia office as a place to forward mail to Pelypenko. Pelypenko's story, if believed by the jury, as it must have been, showed that Molzahn was ready to help in obtaining a false passport while his objection to having Kunze's mail forwarded to his office which he made to Pelypenko, Gerhard Kunze and Pastor Schlick, indicated fear, caution, or consciousness of guilt, rather than a disinclination to facilitate the plans of the conspirators.

The crucial question is whether he knew that Kunze was directly or indirectly to transmit military information to Germany and Japan. We think that the jury could find that Molzahn had such knowledge. The fact that in May, 1941, he advised Pelypenko to help German aims by giving information about factories and military equipment shows a direct interest in German espionage activities. When Pelypenko stated that Kunze's "business was very important, because he has with him important papers," Molzahn said: "That I know." Molzahn's guarded reference of Pelypenko to Evers when Pelypenko desired to make a contact with the Germany Embassy would have seemed unnecessary for one not a participant in a questionable enterprise. His designation by the German Consul as an important co-worker and his selection by the co-conspirators as a proper man to aid their activities indicate a reliance on Molzahn by the conspirators unlikely to be accorded one not a dependable party to their schemes. Indeed, it was strange for Kunze to use Molzahn's office, instead of that of his own Pastor Schlick, as a forwarding address for letters to Pelypenko if he had not been dealing with a reliable confidante when so doing. All these things, added to the evidence of Molzahn's sympathy with the Nazi cause, including his suggestion to Bishop Pfatteicher of divided loyalty, made a substantial case for the government. They fitted into the framework of a conspiracy to transmit military information and justified the verdict of the jury and the refusal of the trial judge to set it aside.

We have thus far only discussed the merits which, in our opinion, support the judgment. But the appellant not only relies on insufficiency of proof of the charge against him but on errors said to have been committed in the course of the trial.

The first error alleged is that conversations relating to Molzahn, to which he was not a party, were admitted. These

conversations were at the Hotel Bismarck on July 26, 1941. They confessedly were competent evidence if there was proof aliunde that Molzahn was connected with the conspiracy, and for the reasons already stated we hold there was. This proof consisted largely of the testimony of Pelypenko, the credibility of which was a question for the jury, but it was strengthened by evidence of Molzahn's interest in the Nazi cause, of his expression to his Bishop of divided loyalty and of his readiness to act as a conduit for both Kunze and Pelypenko.

Appellant next questions the admissibility of Pelypenko's statement that he was told by Molzahn that he knew Kunze expected to leave and to take with him important papers on the ground that it was at best an admission by Molzahn and only competent if and when corroborated. It, however, was an admission made not after the crime was completed but in the course of the alleged conspiracy and accordingly did not have to be corroborated. *Warszower v. United States*, 312 U. S. 342, 347. Moreover, it was corroborated by the surrounding circumstances that we have related at length.

The next error claimed is the admission of two letters dated December 8, 1941, offered by the government. The first (Gov. Exh. 35) written by Kunze to "My dear Ferdinand and Wolf" asked that the second letter, which apparently was enclosed, be forwarded by air mail "from El Paso on" after they had read it "and, if desired, changed the address." The first letter went on to say: "But please be careful in taking the letter over the border. Should you get a reply then send mail or money from Juarez to Kurt per his name; he will then forward the things." "Ferdinand," to whom this was addressed, was the brew-master Goeldner of Juarez, whom Kunze went to see when he was in El Paso the last of October, 1941, and "Wolf" was the defendant Wolfgang Ebell. This letter was in German and had a postscript which was not offered by the government but later put in evidence on behalf of the defendant.

The postscript (Deft's Exh. R) was not in Kunze's handwriting and was signed "Kurt." According to the testimony the signer was "Kurt Tuermer," a friend of Goeldner's at Mexico City, and not Kurt Molzahn. The postscript apparently referred to Ferdinand Goeldner, one of the addressees of the letter (Gov. Exh. 35).¹

The second letter (Gov. Exh. 34)² was from Kunze to Vonsiatsky and signed under his alias "Wilhelm Gerharda-

¹ In translation, Exh. 35 reads as follows:

I have your postscript from Monterey. You could have come a little farther while you were about it and paid me a visit. I shall write you a longer letter within a few days, so that you may become informed as to what is going on here in all the time intervening.

Hearty greetings to all and to you.

Your Kurt.

² Gov. Exh. 34:

Mexico, Dec. 8th, 1941.

My dear Anastaszi Andreivich!

Roosevelt finally has what he thinks he wanted, but before long he will have "it" "in the neck." If the Japanese war had waited a few weeks more, I'd have been in Japan; as it is, I shall have gone on in another direction by the time this letter reaches you.

The *Atlantic crossing by air*, which I originally had in mind, would cost \$2,600.00 *more than I have now* and would require months of waiting. Another method of travel, *the only other one left open*, will require about \$1,000.00 *more than I have*. There can be no *going back* for me any more, and the farther away I go, the more difficult it will become to send me money.

Please send what you can to:

DR. WOLFGANG EBELL,
111 N. MESA,
EL PASO, TEX.

He is my very good friend and I have asked him to forward *money or mail* intended for me to another address. (Please do not use *my name* on money-orders or letters, but only *his*.) Do not write much, as his mail may be censored. * * *

H. H.!

Your

Wilhelm Gerhardavich

vich." It was to be forwarded by Goeldner and Ebell and contained a request for the advance of an additional \$1,000 which we have alluded to previously. It is argued on behalf of the plaintiff that the admission of the letter in which "Kurt" is mentioned as a person to whom Goeldner should forward to Kunze the additional money to be received from Vonsiatsky was erroneous and so prejudicial to Molzahn as to alone require a reversal of the judgment. But we cannot say that it was not proper to admit the letter in evidence. Before the identity of the "Kurt" mentioned in the letter with Molzahn was disproved, it was possible to believe that the letter referred to to Molzahn since his name was Kurt and he had already been implicated in the conspiracy if the jury believed the testimony of Pelypenko. When it was shown that the Kurt referred to in Government's Exhibit 35 and the signer of the postscript was not Molzahn, the latter, if he feared that the reference was prejudicial, should have moved to strike out the letter mentioning "Kurt," or should have asked the court to charge that there was no proof that Molzahn was the person referred to. It seems to us that all connection of Molzahn with the proposed forwarding of the \$1,000 from Vonsiatsky to Kunze was so thoroughly disproved that we cannot regard the admission of the letter about "Kurt" seriously. So far as the letter showed the continuance of a conspiracy and the different plans of Kunze to leave the country in furtherance of the plan to aid the enemy it must be regarded as on a par with other acts of those shown to have been engaged in a conspiracy from which it was not shown that Molzahn, if implicated, had withdrawn.

Finally, appellant's counsel makes a general complaint that he did not have a fair trial. We have carefully examined the testimony and find the conduct of the trial not only fair but scrupulous to protect the defendant's rights

and unusually competent. While we must regret that a man of the talent and apparent general good purposes in life of Molzahn should be convicted of participation in a conspiracy which so far as the proof shows was originally hatched out by the other defendants, and while it may be that the testimony of the informer Pelypenko was false as to Molzahn's admission, and while it is possible that Molzahn, though sympathetic with the Nazi cause, never became aware that he was proposing to aid in facilitating transmission of military information to the enemy, yet we think there was substantial evidence to the contrary. Accordingly the question of his knowing participation must be left with the tribunal having the duty to determine the guilt or innocence of persons charged with violation of law.

For the foregoing reasons the judgment of conviction is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1052

KURT EMIL BRUNO MOLZAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 689-703 has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 22, 1943 (R. 724), and a petition for rehearing (R. 104-720) was denied the same date (R. 722).¹ The petition for a writ of certiorari was filed May 27, 1943. The jurisdiction of this Court is invoked under Section 240

¹ The opinion of the court had been entered April 2, 1943 (R. 688).

(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there is sufficient evidence to support the jury's finding that petitioner was a party to the conspiracy charged in the indictment.

2. Whether the trial court erred in admitting testimony concerning (a) statements made by petitioner approximately three and one-half years prior to the period of the alleged conspiracy while he was on a trip to Germany, and (b) conversations among his alleged co-conspirators to which he was not a party; and whether there was error in admitting certain letters written by one of the alleged co-conspirators on the ground that the conspiracy had then terminated.

3. An additional question discussed in the petition, but which was not assigned as error or considered by the court below, is whether the case presents an issue of entrapment.

STATUTE INVOLVED

Sections 2 (a) and 4 of Title I of the Act of June 15, 1917, 40 Stat. 217, 218, 219; 50 U. S. C. 32, 34, provide in pertinent part as follows:

SEC. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the ad-

vantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: * * *

SEC. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. * * *

STATEMENT

Petitioner and Anastase A. Vonsiatsky, Gerhard Wilhelm Kunze, Wolfgang Ebell, and Otto Willumeit were indicted in one count in the District Court for the District of Connecticut for conspiring, from on or about January 1, 1941, to on or about December 6, 1941, to communicate,

deliver, and transmit to the governments of Germany and Japan and to representatives of those governments, information relating to the national defense, with intent and reason to believe that the information would be used to the injury of the United States and to the advantage of Germany and Japan (R. ix-xiv). The defendants other than petitioner pleaded guilty (R. ii, 690). Petitioner was convicted after a trial before a jury (R. viii, 677) and was sentenced to imprisonment for ten years (R. viii, 679). On appeal, the conviction was unanimously affirmed (R. 724).

The Government's case may be thus summarized:

Vonsiatsky was the leader of the Russian National Revolutionary Party, which had for its purpose the overthrow of the present Russian Government and which published a Russian language newspaper called "The Fascist" (R. 4). He attended German-American Bund affairs and was often seen on such occasions and at his home near Thompson, Connecticut, with the defendant Kunze, Fritz Kuhn, and other leaders of the Bund, as well as with Japanese people (R. 3-4).

Kunze was born in the United States, but he became a citizen of Germany in November 1941 (R. 566). He was National Leader of the Bund (R. 89-90) and an acknowledged Nazi (R. 577).

Ebell is a physician who, from 1931 to the time of his arrest, practiced medicine in El Paso, Texas (R. 608-609). He was born in Germany

and served in the German army in the last war. He left Germany in 1927 and, after spending some time in Mexico City, where he represented a German laboratory, and in Monterrey, Mexico, he emigrated to the United States in 1930. (R. 607-608.) He was a member of the Bund (R. 618) and was associated with Kunze in its affairs (R. 609, 618). His United States citizenship was revoked in April 1942 (R. 610, 615). 44 F. Supp. 43 (W. D. Tex.).

Willumeit was a Chicago restaurateur (R. 91). He was born in Germany, came to the United States in 1925 and, after some study in Chicago, returned to Germany, where, in 1936, he was graduated in medicine from the University of Bonn (R. 88-89). He became an American citizen in 1931 (R. 106). He joined the Bund in 1937, and from 1938 until it was dissolved in 1941 he was the Chicago unit leader (R. 89).

Petitioner was the pastor of Old Zion Lutheran Church in Philadelphia. He was born and educated in Germany and served in the German army in the last war (R. 419-422, 423-424). In 1924 he was sent by the Board of Education of the United Lutheran Church to Susquehanna University in Pennsylvania and after a few months of teaching there he was called to the pastorate of a church in Johnstown, Pennsylvania (R. 424-426), where he served until 1929, when he accepted a call from Old Zion Church

(R. 391, 429). He was naturalized in 1940 (R. 430).

Aleksy Pelypenko, a Roman Catholic priest of the Ukrainian Rite (R. 5), testified that in 1937 he was assigned to Argentina as a missionary among the Ukrainian colony and that, while there, he furnished information to British intelligence authorities and the American Embassy (R. 5-6). In December 1940, he received from Prince Schaumburg-Lippe, the adviser of the Germany Embassy in Buenos Aires, a card bearing the prince's name and address for purposes of identification (R. 7, 43, 44). On March 24, 1941, at the suggestion of officials of the American Embassy in Buenos Aires, Father Pelypenko came to the United States; he was met by an agent of the Federal Bureau of Investigation, and from then until August 1941 he worked in contact with the Bureau (R. 6, 27-28). He first went to Chicago, where he met Willumeit in a Ukrainian restaurant (R. 7, 31, 90). Willumeit stated that he was a leader among German people in Chicago and was in contact with the German authorities (R. 32). The two met frequently thereafter (R. 33, 90-91).

In May 1941, Father Pelypenko visited the German consul in Philadelphia (R. 7-8) and, in response to his expressed desire to become acquainted with persons aiding German propaganda (R. 38), the consul gave him petitioner's name and address (R. 8); the consul described petitioner

as one of the "important co-workers" of the consulate (R. 38). When Father Pelypenko also asked the consul to get him in touch with the German Embassy, the consul said that it would be "more convenient" to make the contact through petitioner (R. 44-45). Shortly thereafter, Father Pelypenko visited petitioner, explaining that he had been directed to him by the consul (R. 37-38) and that he wished to be placed in contact with the Embassy (R. 8). Petitioner said that he knew Baron von Geinanth, but that the contact would have to be made through Pastor Evers of Baltimore, who, he said, was another "co-worker" "working with the Embassy" just as he was, and he gave Father Pelypenko the latter's address (R. 8-9; see also R. 23, 37). Father Pelypenko also asked petitioner what he thought about "the aid of the Ukrainians in the German aims," and petitioner said that Ukrainian aid "may be directed in three directions," first, by "propaganda against war and against the warring authorities in Washington"; second, by "propaganda amongst Ukrainians concerning independence of the Ukraine"; and third, by giving "information about factories and military equipment" (R. 9).

The following day Father Pelypenko visited Pastor Evers in Baltimore, after which he went to the German consul in that city, who gave him the address and telephone number of the Embassy in Washington (R. 9-10). The consul telephoned

von Haydn, the secretary of the Embassy, who asked that Father Pelypenko come to Washington. Father Pelypenko accordingly met von Haydn in a hotel in Washington and at their meeting petitioner was discussed (R. 10).

Early in July 1941, Father Pelypenko met Kunze at the Bund office in New York by means of a letter of introduction given to him by Willumeit (R. 11, 36, 90). In the latter part of the same month, at the invitation of Willumeit, Father Pelypenko met him and Vonsiatsky and Kunze at the Hotel Bismarck in Chicago (R. 10, 35, 91), the meeting having been arranged by the latter two a few days before (R. 91, 586). Vonsiatsky stated that he had just returned from San Francisco, where he was to have met a female Japanese agent coming in on the *Tatu Maru*, but that the ship had not arrived. He had prepared information for her concerning the location of the American Army, fleet, and aviation. It was agreed that because of her failure to arrive, this information, as well as additional information gathered by Kunze, Willumeit, and other "co-workers" concerning the military position of the United States, would be taken by Kunze to South America, whence he would try to go to Berlin. Kunze said that petitioner was his co-worker in Philadelphia and asked Father Pelypenko to visit petitioner there and work with him in obtaining a passport. Kunze agreed to write to petitioner concerning this matter and said that petitioner

would take care of everything. He also said that he was afraid to make the trip with an American passport through the English blockade and that he would prefer to have a Polish or Czech document which would enable him to go through as an ally. Kunze gave Father Pelypenko \$50 to aid in obtaining a passport. (R. 12-13, 22-23, 91-92, 95, 109, 622-623, 623-624.)

Father Pelypenko returned to New York after the meeting and a few days later he received a letter from Kunze stating that he had "written to Pastor M"² and enclosing two small photographs of Kunze (R. 13-14, 15; see also R. 23). The flap of the envelope bore the legend "K c/o Rev. Molzahn, Zion Luth. Church, Franklin Square, Phila., Pa." (R. 695). Father Pelypenko went to see petitioner in Philadelphia immediately after he received the letter, but was told at the church that petitioner was away on vacation, and so he left the two photographs for petitioner (R. 16). On his return to New York, Father Pelypenko received a second letter from Kunze, postmarked August 2, 1941, containing three larger photographs, and bearing a forward-

² This statement was admitted as evidence only that Kunze had written the statement and not as evidence that a letter to petitioner was written (R. 15). Kunze himself testified that he had in fact written to petitioner, though insisting that the letter did not contain instructions for the purpose of assisting Kunze to leave the country (R. 560-562). Petitioner's testimony was that he received no letter whatever from Kunze (R. 461-462, 458).

ing address in care of petitioner (R. 14, 15). Father Pelypenko again went to Philadelphia and, finding that petitioner was still away, left two of these photographs (R. 17).

Thereafter Father Pelypenko went to Thompson, Connecticut, to see Vonsiatsky. The latter told him that he was sending Kunze with important papers and requested him to assist Kunze in getting across the border; he said that because Father Pelypenko was a priest he could take things with him across the border and accordingly asked him to accompany Kunze (R. 19, 22). Vonsiatsky had previously given Kunze \$2,800 to finance the latter's trip through Mexico and thence to Berlin (R. 45, 144-145). Vonsiatsky also asked Father Pelypenko to visit the Japanese military attaché at the Embassy to ascertain the whereabouts of an important female Japanese espionage agent and told him to advise the attaché that Vonsiatsky's espionage system was so well organized that he could give full information about forces to Tokyo and Berlin within a few hours (R. 19-20). Father Pelypenko called on the attaché in Washington and was advised that it would take a few days to locate the agent in question. The attaché wished to know whether airplanes were being sent to Russia through Alaska and said that he would like to talk to Vonsiatsky personally. Father Pelypenko returned to Thompson and reported this to Vonsiatsky. (R. 20-21.)

About the middle of September 1941, Father Pelypenko saw petitioner in Philadelphia (R. 17, 19). Petitioner told him that he had received a letter from Kunze and had done "what he could" (R. 17). When Father Pelypenko displayed one of the letters he had received from Kunze with petitioner's address on the flap of the envelope, petitioner tore the address off and told Father Pelypenko "to be careful with it" (*ibid.*).³ He said that Kunze had been at his residence a few times, that Kunze was a good man but was a "dunce," because he had not been "very careful" (R. 18). Petitioner stated in connection with this letter that in his correspondence with Baron von Geinanth he had "had an unfavorable experience with the post office, because of the back address" (R. 18-19). Father Pelypenko asked petitioner how he could communicate with Kunze and petitioner gave him the address of defendant Ebell in El Paso (R. 18). Father Pelypenko stated that Kunze "expects to leave," and that "this business was very important, because he [Kunze] has with him important papers," and to both of these statements petitioner replied that he knew (*ibid.*).

Early in October 1941, Kunze and Willumeit made an extensive trip through the northwest United States, the Pacific Coast, and the south-

³ There was no dispute concerning the fact that the letters and envelopes displayed by Father Pelypenko were in the handwriting of Kunze (R. 14-15, 115).

west, visiting various units of the Bund (R. 95-101). Kunze displayed a thorough and complete knowledge of shipping facilities, naval bases, coastal fortifications, and possible invasion points, and their itinerary took them near and through harbors and docks, oil refineries, airplane factories, and various military installations (*ibid.*). In the course of the trip Kunze told Willumeit that he had knowledge of a certain device and that "he would do anything that this country would not get that" (R. 100). Upon their arrival in El Paso in the latter part of October they visited Ebell (R. 101). The latter was known to American and Mexican border officers, and he drove them to Juarez, Mexico, where they unsuccessfully sought to meet a brewmaster named Ferdinand Goeldner (R. 102-104, 563, 602, 610). Thereafter Kunze and Willumeit returned to Chicago via San Antonio, Houston, New Orleans, and St. Louis (R. 105). Early in November, Kunze returned to El Paso, crossed the border into Mexico, and reached Mexico City about November 11, 1941, where he remained until he was arrested and extradited in July 1942 (R. 54, 106, 564, 569, 601, 602, 605, 606). On December 8, 1941, Kunze wrote to Goeldner and Ebell from Mexico City, enclosing a letter from him to Vonsiatsky, which he asked Goeldner and Ebell to forward to Thompson, Connecticut, from El Paso;⁴ he also

⁴ The envelope containing this letter of December 8 was addressed to Goeldner in Juarez (R. 566).

requested that the reply to his letter to Vonsiatsky be forwarded from Juarez to "Kurt" (R. 145, 146-147; see also R. 563). In his letter to Vonsiatsky, Kunze stated that because of Pearl Harbor he could not go to Japan, that he would have to go "in another direction," that to cross the Atlantic by air would cost too much, but that he had "another method of travel," and requested Vonsiatsky to send him another \$1,000 via Ebell in El Paso (R. 145, 146). On cross-examination of Kunze it was brought out that at the time he was arrested by the Mexican police he had a boat lying in a fishing harbor in which he intended to cross the Atlantic (R. 567).

In January or February 1942 Father Pelypenko visited Ebell's office in El Paso at the address which petitioner had given him and was advised by Ebell's assistant that Kunze was in Mexico and that Ebell had taken him across the border (R. 24).

In addition to the foregoing, the Government introduced, as evidence of petitioner's intent and motive (R. 62), the testimony of one Flatter that he was a fellow passenger with petitioner on a voyage to Germany in 1937 (R. 61). Petitioner wore the Nazi party emblem aboard ship (R. 65, 66). Flatter had been discharged from the faculty of a German school in 1933 because of his opposition to Hitler and the Nazi party (R. 60-61, 80), and petitioner urged him to join the party and offered to assist him in reestablishing himself

(R. 66, 67-69). Petitioner stated that he was going to Berlin for conferences with "higher-ups" of the party and that he was a member of the party (R. 69). He gave Flatter a card of introduction to one Behrensmann, a Gestapo official (R. 67, 87), and suggested that Flatter call upon Behrensmann (R. 68).

In 1938 petitioner's bishop cautioned him to discontinue his friendly relations with one Kesemeier (R. 644), a notorious and active Nazi in Philadelphia (R. 227, 229, 246, 263, 279). In 1939 petitioner discussed with his bishop an invitation which he had received to return to Germany, and the bishop advised him that if he stayed in the United States he should become a citizen (R. 642-643). Petitioner stated that he "found it rather difficult to focus upon one supreme loyalty, having been a German so long and having relatives of his wife in England, and also having this home of his with his kiddies in America" (R. 644).

There was also evidence that petitioner spoke at several Bund affairs (R. 572-573)⁵ and that in 1934, shortly after a trip to Germany, he delivered a speech praising the present German regime (R. 532-541). In May 1942, when agents of the Federal Bureau of Investigation searched his home

⁵ The evidence was given by Kunze, a defense witness, and is in accord with testimony by Pastor Schlick, also a defense witness (R. 292-293), the truth of which petitioner denied (R. 479).

with his consent (R. 117), they found photographs of Hitler and Goebbels and a number of documents put out by German propaganda agencies (R. 118-121, 131-134).

ARGUMENT

I

We do not understand petitioner to contend that the conspiracy charged in the indictment was not proved, and, indeed, such a position could not be maintained, for the evidence indubitably showed the existence of the unlawful agreement. Rather, his position is that there was insufficient evidence to show that he knew of and participated in the conspiracy (Pet. 21-34). Petitioner's contention in this regard is pitched largely upon the thesis that Father Pelypenko's testimony concerning his conference with petitioner following the meeting in Chicago of Kunze, Vonsiatsky, Willumeit, and Father Pelypenko (see pp. 8-9, 11, *supra*), was the only evidence connecting or tending to connect petitioner with the conspiracy (see Pet. 27-32).⁶ But "the character and effect of a conspiracy is not to be judged by

⁶In connection with his conference with Father Pelypenko, petitioner correctly points out that the issue is largely one of veracity as between himself and the priest (Pet. 13, 15-16). This was a question for the jury. It is worthy of note that on the issue whether Father Pelypenko and petitioner had had a prior meeting, which petitioner denied (R. 442, 511-512, 515, 544), petitioner's assertions were refuted by documentary evidence (R. 7-9, 23, 159, 168).

dismembering it and viewing its separate parts, but only by looking at it as a whole." *Hamburg-American Steam Packet Co. v. United States*, 250 Fed. 747, 757 (C. C. A. 2), certiorari denied, 246 U. S. 662, and cases cited. We believe that viewing the evidence as a whole, with the inferences reasonably to be drawn therefrom, in the light most favorable to the Government (as we must, *Glasser v. United States*, 315 U. S. 60, 80), there was sufficient to permit the jury to resolve the issue of petitioner's guilt and to justify its conclusion.

At the meeting of Vonsiatsky, Kunze, Willumeit, and Father Pelypenko in Chicago, it was determined that Kunze should take the military information that Vonsiatsky and he had gathered to Berlin, and Kunze requested Father Pelypenko to visit petitioner in Philadelphia and work with him to secure a passport. Kunze said that he would write to petitioner concerning the matter. When Father Pelypenko saw petitioner after he had delivered Kunze's photographs to petitioner's church, petitioner acknowledged that he knew Kunze expected to leave and that Kunze had with him important papers. Petitioner told Father Pelypenko that he had received a letter from Kunze and had done "what he could." This evidence, although not decisive, was at least sufficient to warrant the inferences, which the jury evidently drew, that petitioner knew of the existence of the conspiracy and that he had done some-

thing in an effort to obtain a passport for Kunze and thus actively participated in the furtherance of the unlawful scheme. What he did and the success of his efforts are entirely immaterial, for if he joined in the conspiracy he is equally punishable with the rest, even though he may have done nothing in execution of its purpose, so long as one of the conspirators committed an overt act. *United States v. Rabinowich*, 238 U. S. 78, 86; *Bannon v. United States*, 156 U. S. 464, 468.

Nor was this the only evidence of petitioner's guilty knowledge and participation. He knew Kunze's prospective whereabouts, for he told Father Pelypenko that Kunze could be reached in care of Ebell in El Paso. Moreover, with no hostile motive, Kunze used petitioner's office as a forwarding address in his communications to Father Pelypenko. Inculpatory also was petitioner's action in taking from Father Pelypenko the flap of the envelope which contained Kunze's letter and photographs and which bore petitioner's name and address, and his criticism of Kunze for indiscretion in that regard. In addition, his advice to Father Pelypenko that German aims could be aided by giving information about factories and military equipment, the evidence of his connection with the German Embassy and consulate, the consul's designation of him as an important co-worker, and his selection by Kunze, who also described him as a co-worker, to aid in obtaining

a passport, all support a finding of a close connection with the conspiracy.

The Government's case, it is true, depends in large part upon a collocation of circumstances tending to sustain the inferences necessary to support the verdict. But, indeed, a conspiracy is often susceptible of proof in no other way. *United States v. Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664. It is settled, too, that when a conspiracy is established, as it was here, only slight quantitative evidence connecting a defendant with it may in the circumstances be substantial and, therefore, sufficient to warrant submission to the jury of the issue of the defendant's guilt. *Meyers v. United States*, 94 F. (2d) 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Marx v. United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Galatas v. United States*, 80 F. (2d) 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711. As the issue of petitioner's knowing participation in the conspiracy was submitted to the jury under instructions which were eminently fair and correct (R. 667, 670, 671, 673-674, 675),⁷ no sufficient reason appears why the concurrence of the jury, the district judge (see R. 678-679), and the circuit court of appeals as to the sufficiency of the evidence should not be ac-

⁷ The trial judge iterated throughout his charge that before the jury could convict they must find that petitioner had knowledge of the purpose of the conspiracy and that he intentionally participated in it (*ibid.*).

cepted as final. *Delaney v. United States*, 263 U. S. 586, 589-590.*

II

Petitioner's contentions that the trial court erred in admitting certain evidence likewise present no question for further review.

(a) Petitioner argues (Pet. 35-37) that the testimony of Flatter concerning his conversations with petitioner during the voyage to Germany in 1937 (see pp. 13-14, *supra*) was inadmissible, both because there was no connection between petitioner's statements at that time and the alleged conspiracy in 1941, and because as evidence of petitioner's state of mind his statements had no probative value in the absence of proof that he did some act in furtherance of the conspiracy. This testimony, however, as well as other evidence of similar statements made by petitioner prior to 1941 (*supra*, p. 14), was clearly admissible to show his intent, motive, and state of mind.⁹ All these statements

* There is no merit in petitioner's further contention (Pet. 32-34) that Father Pelypenko's testimony concerning petitioner's admissions was not corroborated and was therefore insufficient to take the case to the jury. As the court below said (R. 700), the admissions were made during the course of the conspiracy, not after the completion of the crime, and therefore corroboration was not required. *Warszower v. United States*, 312 U. S. 342. However, if it be necessary, corroboration is found in the other evidence which we have summarized above and in the Statement, *supra*, pp. 6-15.

⁹ In his instructions, the trial judge correctly told the jury that the testimony as to petitioner's actions and statements at the time of his voyage in 1937 could be considered only as

disclose a continuing and persistent attitude of sympathy with and responsiveness to the interests and aims of the Nazi party and the German Reich. The testimony complained of did not concern a single, isolated expression of petitioner's attitude, but was only one item of evidence showing a purpose which culminated in his participation in the conspiracy. See *Debs v. United States*, 249 U. S. 211, 215; *Williamson v. United States*, 207 U. S. 425, 451; *Allis v. United States*, 155 U. S. 117, 119; *Wood v. United States*, 16 Pet. 342, 360-361; *Viereck v. United States*, 130 F. (2d) 945, 959-960 (App. D. C.), reversed on other grounds, March 1, 1943, No. 458, this Term; *United States v. Pelley*, 132 F. (2d) 170, 180-181 (C. C. A. 7), certiorari denied, February 15, 1943, Nos. 645-647, this Term; *Schoborg v. United States*, 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Howenstine v. United States*, 263 Fed. 1, 5-6 (C. C. A. 9); *Stenzel v. United States*, 261 Fed. 161, 162 (C. C. A. 8); *Shidler v. United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman v. United States*, 257 Fed. 601, 603-604

bearing upon his state of mind during the period of the alleged conspiracy, and that it was for them to determine whether his actions during that period were done with intent to carry out the purpose of the conspiracy (R. 672, 674-675). Cf. *Shidler v. United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman v. United States*, 257 Fed. 601, 603-604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell v. United States*, 256 Fed. 805, 811-812 (C. C. A. 1), certiorari denied, 250 U. S. 661.

(C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell v. United States*, 256 Fed. 805, 811-812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner v. United States*, 255 Fed. 301, 304-305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678. Furthermore, the trial court has discretion in the admission of evidence which discloses intent (*Glasser v. United States*, 315 U. S. 60, 81-82; *Partridge v. United States*, 39 App. D. C. 571, 576), and a wide latitude is permitted when it is an important element of an offense. *Hallock v. United States*, 185 Fed. 417, 424-425 (C. C. A. 8), certiorari denied, 220 U. S. 613; cf. *Williamson v. United States*, 207 U. S. 425, 451.

(b) Petitioner also complains (Pet. 37-39) that it was error to admit the testimony of Father Pelypenko and Willumeit as to the conversations at the meeting at the Bismarck Hotel in Chicago of Kunze, Vonsiatsky, Willumeit, and Father Pelypenko (see pp. 8-9, *supra*); he argues that this testimony was hearsay as to him and that it was offered to prove his connection with the conspiracy. However, as the court below held (R. 699-700), there was proof *aliunde*, to which we have already adverted (*supra*, pp. 16-18), of petitioner's knowledge of and participation in the conspiracy, and the statements were therefore competent evidence against him. *Glasser v. United States*, 315 U. S. 60, 73-74; *United States v. Manton*, 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664. And while the

proof indicates that petitioner joined the conspiracy after its inception, the evidence was nevertheless admissible against him, for it is settled that one who joins a criminal conspiracy becomes equally guilty as those who participated at its formation and is equally accountable with the original conspirators for the acts done and statements made prior to his membership. *United States v. Manton, supra*; *Marino v. United States*, 91 F. (2d) 691, 696 (C. C. A. 9), certiorari denied *sub nom.* *Gullo v. United States*, 302 U. S. 764; *McDonald v. United States*, 89 F. (2d) 128, 133 (C. C. A. 8); *Laska v. United States*, 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker v. United States*, 21 F. (2d) 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621; *Van Riper v. United States*, 13 F. (2d) 961, 967 (C. C. A. 2), certiorari denied *sub nom.* *Acker-son v. United States*, 273 U. S. 702.¹⁰

(c) Finally, petitioner contends (Pet. 39-40) that Kunze's letters of December 8, 1941, written in Mexico, the first to Ebell and Goeldner, and the second to Vonsiatsky (see pp. 12-13, *supra*), were improperly admitted because at that date the conspiracy had terminated. A mere reading of the

¹⁰ In respect of this contention it should be noted that the trial judge specifically instructed the jury that evidence as to acts and statements of the other conspirators outside of the presence of petitioner could be considered against him only if the jury found from the evidence concerning his own acts and declarations that he had knowledge of the conspiracy and intentionally participated in it (R. 673-674).

letters (R. 146-147) indicates otherwise. The letter to Vonsiatsky shows that Kunze's trip was still in contemplation, the object of the conspiracy still pending, and he asked Vonsiatsky to send him via Ebell in El Paso an additional \$1,000 for expenses. The letter to Ebell and Goeldner requested them to forward the letter to Vonsiatsky and to forward the latter's reply with the money to "Kurt." Manifestly, these letters were written in execution of the conspiracy to communicate, deliver, and transmit information relating to the national defense to the governments of Germany and Japan, as alleged in the indictment, and they were, therefore, properly admitted.¹¹

In connection with the letter to Ebell and Goeldner, petitioner also complains (Pet. 40-43) that the reference in it to "Kurt," and the manner in which the prosecutor read the letter to the jury, was prejudicial, because the jury may have inferred that the person referred to was he. The defense later, however, proved through Kunze that the "Kurt" referred to in the letter was one Kurt Tuermer, a friend of Kunze's in Mexico City whom he visited during his stay there (R. 563-564), and, in addition, the defense read into evidence a translation of the postscript which was appended to the letter and which was written by

¹¹ The indictment alleged that the conspiracy continued to on or about December 6, 1941 (R. ix). However, the offense charged being a continuing one, the Government was not bound by the specific date alleged. *Ex parte Montgomery*, 244 Fed. 967, 970 (S. D. N. Y.), affirmed, 246 U. S. 656.

Tuermer to Ebell and Goeldner (R. 604-605). The defense did not, either at the time the prosecutor read the letter to the jury (see R. 147) or when they proved that the "Kurt" referred to was Tuermer (see R. 564, 602, 605), ask that the reference to "Kurt" be stricken or that the jury be instructed that petitioner was not the person referred to. As the court below said (R. 702), any inference that petitioner was connected with the proposed forwarding of money from Vonsiatsky to Kunze in Mexico was so thoroughly disproved that the reference to "Kurt" cannot be regarded seriously.

III

Petitioner contends (Pet. 51-59) that he was entrapped into the conspiracy by the actions of Father Pelypenko. This Court has held that the question of entrapment is one for the jury. *Sorrells v. United States*, 287 U. S. 435. While the question was raised as a ground of petitioner's motion for a directed verdict at the close of all the evidence (R. 662-663), there was no request to instruct the jury in respect of this claim and no exception to the court's charge (R. 676-677). Moreover, although petitioner assigned as error the denial of his motion for a directed verdict, the assignment was predicated upon the asserted insufficiency of the evidence (R. xxiii-xxiv) and nowhere in the assignments of error was the matter of entrapment mentioned (R. xxi-xxiv).

Hence, no such issue was presented to or considered by the court below. The contention therefore appears to be not now open to petitioner. Cf. *Sonzinsky v. United States*, 300 U. S. 506, 514.

In any event, the contention is lacking in substance. Entrapment consists essentially of instigation by Government agents of the commission of a crime. *Sorrells v. United States*, 287 U. S. 435, 451, 454; *Poliski v. United States*, 33 F. (2d) 686, 687 (C. C. A. 8), certiorari denied, 280 U. S. 591. There is not the slightest evidence that Father Pelypenko induced petitioner's participation in the conspiracy. The German consul first referred Father Pelypenko to petitioner as an "important co-worker" of the consulate, and at his first meeting with petitioner in May 1941 Father Pelypenko asked petitioner's views as to how the Ukrainians could aid German aims and requested petitioner to place him in contact with the German Embassy. Father Pelypenko was invited to the meeting at the Hotel Bismarck in Chicago by Willumeit, one of the conspirators. Father Pelypenko and Willumeit both testified that it was Kunze, not Father Pelypenko, as petitioner suggests (Pet. 54), who brought up the matter of having petitioner secure a passport (R. 12, 23, 92, 95). Father Pelypenko was to act as an intermediary between Kunze and petitioner, and Kunze stated that he would write to petitioner regarding the passport (R. 12, 22-23, 92, 95, 109). When Father Pely-

penko visited petitioner in Philadelphia some weeks later, petitioner volunteered the information that he had received a letter from Kunze and had done what he could, and he stated that he knew Kunze expected to leave with important papers. The evidence thus shows that petitioner's decision to participate in an illegal conspiracy was not implanted in the mind of an innocent person by a Government officer. Father Pelypenko merely feigned the part of an accomplice and his conduct furnishes no basis for the claim that he ensnared petitioner into the conspiracy. See separate opinion of Mr. Justice Roberts in *Sorrels v. United States*, 287 U. S., at 453-454.¹²

CONCLUSION

Petitioner had a fair trial and his conviction is supported by the evidence. No question is pre-

¹² Petitioner's general assertion (Pet. 61-64) that he did not have a fair trial because of his German birth and an atmosphere of "war excitement" pervading the courtroom, is insubstantial. At the very outset of his charge the trial judge directed the jury at length that it was their duty, and the court's, to render even-handed justice without passion or prejudice, that the rights of all persons before the law must be protected, regardless of the place of their birth, that patriotism must not be allowed to cloak injustice, and that the jury must determine petitioner's guilt solely on the evidence (R. 664-665). In respect of petitioner's general attack upon the fairness of the trial, the court below, upon a careful examination of the whole record, found "the conduct of the trial not only fair but scrupulous to protect the defendant's rights and unusually competent" (R. 702-703).

sented which warrants review on certiorari. The petition should therefore be denied.

Respectfully submitted.

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